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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON MICHAEL SCHLIG et al.,

Defendants and Appellants.

E057723

(Super.Ct.No. SWF10001755)

OPINION

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez, Judge. Affirmed in part; reversed in part with directions as to Jason Schlig. Reversed as to Cody Young.

Carla Castillo, under appointment by the Court of Appeal, for Defendant and Appellant Jason Michael Schlig.

Julie Sullwold, under appointment by the Court of Appeal, for Defendant and Appellant Cody Robert Young.

Kamala D. Harris and Xavier Becerra, Attorneys General, Julie L. Garland, Assistant Attorney General, William M. Wood and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

This case involves a fatal shooting which capped a series of confrontations between members and associates of two motorcycle clubs. Defendants Jason Schlig and Shaun Spicher belonged to the Brotherhood Motorcycle Club and defendant Cody Young was a frequent associate of members of the group. The murder victim, Todd Brown, had been a member of the Vagos Motorcycle Club and continued to associate with them, as did his then 20-year-old son Tyler Brown and his son's friend Greg Pearse.

On August 29, 2010, Jason Schlig complained to Tyler Brown about his father's treatment of Shaun Spicher during an altercation at a bar months earlier. Though their conversation was civil, at least on the surface, it angered Todd Brown when he heard about it. He accosted Jason Schlig at a friend's house and said he was making the matter a "club issue"—at least implicitly threatening violence on the part of Vagos members. Later that night, Todd Brown saw Jason Schlig and Shaun Spicher on their motorcycles and pulled a U-turn to follow them. Tyler Brown, Greg Pearse, and another friend, Karl Rogers, rode with Todd Brown. They sped to catch the motorcycles and overtook Shaun Spicher at a stop sign on the corner of Lincoln Avenue and Palm Avenue in Hemet.

Accounts differed, but Cody Young and Shaun Spicher said Todd Brown used his truck to force Shaun Spicher to the side of the road before all four passengers got out and attacked him. Cody Young pulled up behind them in a Chevy Suburban and fired two

warning shots into the air to stop the fight. The ploy worked, but Todd Brown got into his truck and turned it to drive straight at Jason Schlig, who was on foot across the intersection on Lincoln Avenue. Both Jason Schlig and Cody Young began firing at the truck to stop Todd Brown from running Jason Schlig down. Cody Young fired four rounds into the back of the truck, but stopped firing when Todd Brown turned the truck left and drove west on Palm Avenue. Jason Schlig fired 17 rounds. One of his bullets went through the back window and Brown's headrest, striking Todd Brown in the back of the head and killing him instantly.

A jury convicted Jason Schlig of murdering Todd Brown in the second degree, attempting to murder Tyler Brown and Greg Pearse, and discharging a firearm into an occupied motor vehicle. The jury convicted Cody Young of voluntary manslaughter and discharging a firearm into an occupied motor vehicle, but acquitted him of attempting to murder Tyler Brown and Greg Pearse. The jury also found true various firearm allegations against both Jason Schlig and Cody Young. The jury acquitted Shaun Spicher of being an accessory after the fact. The trial court sentenced Jason Schlig to 35 years to life and Cody Young to 16 years in state prison. Jason Schlig and Cody Young appealed. Shaun Spicher is not a party to the appeal.

We conclude appellants have identified consequential errors in their trial. First, the trial court improperly admitted evidence they participated in an unrelated beating, which bore no similarities to the shooting, but which the prosecution used aggressively to establish appellants initiated the altercation with Todd Brown and were prone to

resolving disputes with violence. Second, the court improperly excluded evidence Todd Brown had, on another recent occasion, used his truck as a weapon against a Brotherhood member. Third, the court improperly instructed the jury appellants had no right to defend themselves if they were the aggressors.<sup>1</sup>

These errors undermine our confidence in all but one of the jury's verdicts. We conclude, absent the first two errors, it is reasonably probable Cody Young would have succeeded in convincing the jury to acquit him based on his defense-of-another defense.<sup>2</sup> We therefore reverse the judgment of conviction on both counts against Cody Young. We conclude, absent all three errors, it is reasonably probable the jury would have found Jason Schlig intended to defend himself against Todd Brown when he fired bullets near Tyler Brown and Greg Pearse, and therefore he did not have the intent to kill them, as required for the two counts of attempted murder. We therefore reverse the judgment of conviction as to those convictions.

Finally, we conclude, absent the errors, it is reasonably probable the jury would have found Jason Schlig acted in the heat of passion. There is overwhelming evidence

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<sup>1</sup> Appellants also contend the court erred by: (1) limiting questioning of witnesses for bias against the Brotherhood; (2) excluding evidence members of Brown's family had attacked Greg Pearse and blamed him for Todd Brown's death before he testified; and (3) excluding evidence Todd Brown had prior convictions for crimes committed for the benefit of the Vagos. We reject these assertions of error in parts II.E. and II.F., *post*, and they play no role in our prejudice analysis.

<sup>2</sup> We need not address Cody Young's contention the trial court erred by excluding some (but not all) evidence he knew of certain instances of violent criminal activity he believed the Vagos had committed, because we overturn his convictions on other grounds.

Jason Schlig shot Brown *after* Brown had turned and driven away, when Schlig was no longer in danger of injury. That fact vitiates his self-defense claim as to the convictions for second degree murder and discharging a firearm into an occupied motor vehicle. It does not, however, vitiate the heat of passion defense, which allows a period of cooling off. If the jury had found Jason Schlig acted in the heat of passion, it would have been required to render a verdict of voluntary manslaughter. We therefore reverse the judgment of conviction on the second degree murder count against Jason Schlig. Because the heat of passion defense has no effect on the conviction for discharging a firearm into an occupied motor vehicle, we affirm the judgment of conviction on that count.

## I

### FACTUAL BACKGROUND

#### A. *The Charges*

The District Attorney for Riverside County charged Jason Schlig and Cody Young with murdering Todd Brown in the first degree (Pen. Code, § 187; count 1), attempting to murder Tyler Brown and Greg Pearse (§§ 664, 187;<sup>3</sup> counts 2-3), and discharging a firearm at an occupied vehicle (§ 246; count 4).<sup>4</sup> The People alleged both appellants discharged firearms in committing counts 1 through 3 (§§12022.53, subd. (c), 1192.7,

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<sup>3</sup> Unlabeled statutory citations refer to the Penal Code, except for sections of the Evidence Code we cite repeatedly, for which we establish short-form citations.

<sup>4</sup> The People charged Shaun Spicher with being an accessory after the fact (§ 32), but the jury acquitted him.

subd. (c)(8)) and personally used firearms in committing count 4 (§§ 667, 1192.7, subd. (c)(8)). They alleged Jason Schlig personally discharged a firearm when he fired into the truck and proximately caused Todd Brown's death (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8)) and Cody Young<sup>5</sup> personally used a firearm when he fired into the truck (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8)).

## **B. Key Actors**

### *1. The Vagos crew*

Todd was shot dead on the street in Hemet on August 29, 2010. His shooting and the street fight that triggered it were reactions to a series of seemingly minor confrontations between Todd, his adult son, and his son's friends on the one hand, and members and associates of the Brotherhood Motorcycle Club on the other. At the last of these confrontations before the fight and shooting, Todd told Jason he was declaring their conflict a "club issue" between the Brotherhood and the Vagos, which threatened to—and as it happened did—escalate the dispute.

Todd's precise status with the Vagos is unclear. His son said he had not been a member since 2003 and had not had a working motorcycle for about three years. Many other pieces of evidence, however, contradict his son's testimony. First, law enforcement found a photo collage displaying Vagos members imprinted with "Hemet Motorcycle Club" and "Vagos MC" in the glove compartment of Todd's truck. Second, Todd's son

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<sup>5</sup> From this point, we will use first names to make the facts easier to follow and only first names or nicknames for anyone who did not participate in the confrontations. (Cal. Rules of Court, rule 8.90.)

told a detective after the shooting his father did have a motorcycle that he intended to ride at the funeral. Third, defense counsel offered certified copies of court records showing Todd twice pled guilty in 2006 to being a felon in possession of a firearm for the benefit of a street gang, and argued the convictions showed Todd had remained a member and was willing to engage in gun crimes for the benefit of the Vagos.<sup>6</sup> Fourth, Shaun said he met Todd over a year before the shooting and Todd had introduced himself and held himself out as a member of the Vagos. Shaun also saw Todd on numerous occasions at a bar called Tap Daddy's, a biker club hangout, in the company of Vagos members and he never heard anything about Todd retiring from or giving up his membership. Finally, the President of the Brotherhood said to declare something a "club issue" is to hold yourself out as an active member of a motorcycle club.

Tyler is Todd's son. At the time of these events, he was 20 years old. He had lived his entire life in Hemet with his father. Greg and Karl were his childhood friends. According to Shaun, Todd said Tyler was associated with the Vagos. Tyler was a key participant in and testified about each of the events leading up to his father's shooting.

Greg had been Tyler's friend for several years. Though they did not go to school together, they hung out in the neighborhood, and Tyler said Greg was a close friend. Shaun said Greg also associated with the Vagos. In 2010, Greg was 20 years old and turned 21 shortly before the day of the shooting. He was present for—indeed a

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<sup>6</sup> The trial court excluded evidence of the convictions. We grant Cody's request and take judicial notice of certified copies of records from the convictions. (Evid. Code, §§ 452, subd. (d), 453.)

precipitant of—the initial confrontation at Tap Daddy’s. Greg was also present at the shooting. He testified about both incidents at trial.

Karl was also a friend of Tyler’s and was present for the three confrontations on August 29, 2010. Greg said he had met Karl only a week earlier. Karl did not testify at trial, but the parties read to the jury portions of his preliminary hearing testimony about those three incidents.

## 2. *The Brotherhood crew*

Defendant and appellant Jason was a member of the Brotherhood Motorcycle Club and close friends with Cody. On the day of the shooting, Jason raised with Tyler a months-old confrontation between Todd and Shaun. Events spiraled out of control and ended with Jason shooting and killing Todd. Jason did not testify.

Defendant Shaun was 26 years old at the time of the incident. He was married with a five-year-old son, a three-year-old son, and a three-year-old stepdaughter. He was a platoon sergeant with the U.S. Marine Corps and had served two combat deployments in Iraq. At the time of these events, he lived in Hemet and was stationed in Twentynine Palms.

Shaun had been a member of the Brotherhood for 11 months. At the time of the shooting he was the sergeant at arms, an elected position, which made him responsible for investigating disputes between Brotherhood members and members of other motorcycle clubs if the disputes threatened to escalate. He also worked part-time on weekends as a security guard at Tap Daddy’s, where he got into a conflict with Todd,



Tyler and Greg on March 27, 2010. On the day of the shooting, he spent most of the day moving to a new home. In the evening, he received a call from Jason about a dispute Todd had declared a “club issue” involving the Vagos. The call led to his involvement in the final confrontation. At trial, Shaun testified about that incident and the incident at Tap Daddy’s.

Defendant and appellant Cody grew up in Hemet and spent most of his life there. On the night of the shooting, he was 26 years old. He knew Shaun from high school, where they were on the wrestling team together. He had met Jason three or four months before the shooting, and they had become close friends. Cody was neither a member of the Brotherhood nor a “hang-around”—someone seeking membership—but he did spend a lot of time with Brotherhood members because he had close friends in the club. At the time, he had 15 firearms registered in his name and described firearms as a “big hobby.” Cody received a call from Jason in the evening on August 29, 2010 about the dispute with Todd. The call led him to be present for and participate in the shooting, and he testified about the incident at trial.

### ***C. The Incident at Tap Daddy’s***

Tap Daddy’s was a bar and concert venue in San Jacinto, California. Members of motorcycle clubs, including the Vagos and the Brotherhood, frequented the bar. On March 27, 2010, a cover band performed at Tap Daddy’s. Shaun worked security at the bar that night. Todd was at Tap Daddy’s early on. Tyler and Greg arrived separately in Greg’s vehicle, and Todd left about 10 minutes after they arrived.

At some point, Shaun found Greg in the VIP area of the bar without the proper wristband. According to Shaun, the VIP area was a loft sitting above the concert area designated for people who pay an extra fee for privacy and the chance of meeting performers. Shaun said his job was to make sure only people with VIP wristbands went upstairs and to turn away people without VIP wristbands. The owner of the bar confirmed Shaun's description of the VIP area and his job duties.

Shaun asked Greg to leave the VIP area, more or less civilly, depending on whose version of events you believe. Shaun said he was alone and "politely asked [Greg] to see his wristband and, when he didn't have the proper—he didn't have a wristband on at all, I asked him to—he needed to leave the VIP area." Greg said Shaun "stepped in front of me and . . . said, 'This is VIP only, bitch . . . Get the fuck out of here.'" He said Shaun had two or three other men with him. Greg left the bar, and Shaun resumed his position outside the VIP area.

Greg found Tyler outside and told him what had just happened. On hearing Greg's story, Tyler asked his father to come back. Todd promptly returned to Tap Daddy's and asked to speak with Shaun in the parking lot. Details of the story differ depending on the teller, but all agree Todd punched Shaun before the confrontation was finished.

1. *Tyler's and Greg's accounts of the incident at Tap Daddy's*

Tyler said he and Greg went to Tap Daddy's to see a cover band perform. Neither was sure of the date. Greg drove them to the bar in his truck at about 8:00 p.m.

At Tap Daddy's, Tyler said they went up to a balcony overlooking the performance space. He said they "[j]ust hung out upstairs and watched the band." Tyler said he believed the balcony was open to everyone. After about 20 minutes, he said he left the bar and went outside to call his father because he "didn't want to be there anymore" and wanted his father to come pick him up.

Greg remembered events differently. He said he went to the bar because an ex-girlfriend had asked him to meet her there. He estimated they were at the bar only about ten minutes when Tyler left. Greg said he went upstairs on his own and found the ex-girlfriend. They talked for a couple of minutes before Shaun approached, stepped between them, and asked Greg to leave in very aggressive terms. As noted, Greg said Shaun had two or three other men with him. Greg went downstairs and left the bar.

Greg found Tyler outside talking on the phone—according to Tyler, to his father—and reported the encounter with Shaun. Greg said he told Tyler what had happened and "told him we needed to leave." He said he wanted to leave because "I just had a bigger gentleman than me—I don't know—pretty much I thought he was gonna assault me. I wasn't—I didn't think we were going to be safe there, because he had told us to leave." Tyler said he told his father "he needed to come down here" because "[the Brotherhood was] going to beat up Greg." Though Tyler said Greg was scared and Greg's car was in the parking lot, they stayed at Tap Daddy's and waited for Todd to arrive. Tyler said Todd returned about 10 minutes later. Greg put it at five minutes. When Todd arrived, Greg recounted his story briefly, and then Todd went into the bar.

Tyler said, “My dad went inside and he grabs [Shaun] and a couple other of them to ask them what happened.” Outside the bar, Tyler said Todd asked, “[W]hat the hell happened?” Tyler said Shaun responded by swinging at him. Though Shaun’s swing missed Tyler, Todd hit back. “My dad hit him, and some other guy ran up, got my dad in a headlock, and then I hit that guy,” who let Todd loose. At that point, Tyler said it got quiet, and he, Todd, and Greg left together in Todd’s truck.

Greg said Todd emerged from the bar with Shaun, and about 20 other people followed them out. He said, “I just remember Todd asking me—he was holding [Shaun] by his jacket—and he said, ‘Is this the guy that had words with you?’ [¶] And I said, ‘Yes.’” According to Greg, “At that point I remember [Shaun] putting his hands up, and Todd was saying, ‘Don’t raise your hands to me.’ [¶] And then I remember guys that were with [Shaun] started coming up closer, and [Shaun] told them to get back. And at that point Todd had punched him” in the face. After Todd threw the punch, it was “[c]haos, pretty much. Just everybody crowded—and I—I just remember Tyler was fighting a little bit with just random people. And Todd was just keeping people back, and he was fighting. And I was just kind of in the back, just trying to deescalate the whole thing, telling them ‘Let’s get the hell out of here.’” After a few minutes, Greg, Tyler and Todd jumped into Todd’s truck and left.

## 2. *Shaun’s account of the incident at Tap Daddy’s*

Shaun said shortly after asking Greg to leave the VIP area, he got a call over the radio saying Todd was at the front of the bar and wanted to talk to him. He had known

Todd for a year or so and they got along. He met Todd at the front of the bar and they walked outside together. Todd asked Shaun to walk out to the center of the parking lot with him so they could hear each other.

Once they got into the parking lot, Shaun said Todd accosted him. Todd yelled, “Why are you punking out [my] kid?” Shaun said he was confused because he knew Tyler, but had not seen him that night. When Shaun expressed confusion, Todd said he meant Greg. Shaun asked, “Who’s Greg?” Todd pointed at Tyler and Greg standing on the sidewalk about 18 feet away, and Shaun said he had not “punked out” Greg either. Todd got mad, said Shaun was a liar and warned, “Tyler and Greg are official hang-arounds,” and—referring to the Vagos colors—asked, “Can’t you see their green shoes?” Shaun said he was not looking at their shoes, but Todd remained angry. He told Shaun, “You’d better watch who the fuck you’re talking to because, you mess with these kids, you’re messing with the club.”

At that point Shaun put his hands behind his back as a sign of submission and tried to defuse the situation. Another member of the Brotherhood got punched behind him and the gathered crowd grew excited. Shaun said he again tried to calm everyone down. Meanwhile, Tyler came over to Todd and falsely accused Shaun of taking a swing at him.<sup>7</sup> Todd turned to Shaun and asked why he had done that and punched Shaun in the face. Shaun said he did not respond and kept his hands behind his back. Todd walked

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<sup>7</sup> The trial court struck (erroneously, it seems to us) Shaun’s answer about what Tyler told his father; it allowed him to tell the jury only that Tyler made a false accusation which worried him.

away, with Tyler and Greg in tow, and said, “We’ll handle this later.” Before they left, Shaun said he approached Greg and said, “Hey, if I disrespected you, I apologize” and shook his hand quickly, in passing.

Cari, who owned Tap Daddy’s, witnessed the events in the parking lot from a distance of about 23 feet. She could not hear what Shaun and Todd said to each other and did not mention Tyler approaching Todd, but her account otherwise agrees with Shaun’s account and disagrees with Tyler’s and Greg’s. In particular, she said it was evident from his body language that Shaun was trying to defuse the situation throughout, he did not throw a punch at Tyler or anyone else, and he continued trying to calm the situation even after Todd punched him—an effort that succeeded, contrary to Greg’s account.

Three or four days later, after mediation by a mutual friend, Shaun and Todd met at Shaun’s parents’ house. Todd apologized, explaining, “I had a couple drinks, so you know how I get when I’ve had a couple drinks and someone tells me they’re messing with my kids.” Shaun said he responded, “Well, Todd, all due respect, brother, I wasn’t messing with your kids. And I’m sorry if they felt that I disrespected them, but in my opinion, I did not.” In the end, they shook hands and agreed there were no hard feelings and then had a couple drinks together. Shaun believed the issue was finished and they were on friendly terms.

***D. Todd's Incident of Road Rage Against a Brotherhood Member***

Tap Daddy's owner, Cari, testified outside the hearing of the jury about an incident a few weeks later in which Todd used his truck to confront another member of the Brotherhood. She said she had known Todd for years—since their children were small—that he frequented her bar and she was “pretty close” to him.

Sometime in April 2010, she and her fiancé were headed to Shaun's house for a barbeque. She rode on her fiancé's motorcycle. He was a member of the Brotherhood and wore a vest with Brotherhood patches. She wore a vest with a woman's Brotherhood patch. As he pulled up to a stop sign near Shaun's home, Todd pulled his truck up to the left of the motorcycle. She recognized Todd, and started to wave to him. But Todd glared at them, and when they started to move into the intersection, Todd accelerated abruptly and cut to the right, obstructing their path. The motorcycle was forced off the road into a ditch to avoid running into the truck. Todd did not stop. He straightened his truck out and drove straight through the intersection.

When she saw Todd at Tap Daddy's a few days later, she “walk[ed] up to him and smack[ed] him and ask[ed] him why he ran us off the road.” Todd acted shocked and said, “I didn't know it was you.” Todd told her he saw the colors and the patches, and reacted to them, saying “you know how I feel about those.”

The trial court ruled this testimony was not admissible because it was not relevant to prove Todd's state of mind during the altercation and its probative value was substantially outweighed by its prejudicial impact.

### ***E. The Disciplinary Beating of a Brotherhood Associate***

On July 14, 2010, Jason and Cody were involved in the beating of another man, named Andre, who was not otherwise involved in the events of this case. Jason, a second member of the Brotherhood, and Andre met Cody at Cody's house. Andre, who was in his twenties, was a supporter of the Brotherhood. He was a friend of many Brotherhood members, which the People established by showing the jury a group photograph of Andre at Shaun's wedding with numerous members.

Jason told Cody that Andre had been having a sexual relationship with a 14- or 15-year-old girl, and people who knew about it were unhappy. The three men confronted Andre and showed him a letter and some diary entries the girl had written and a letter from Planned Parenthood. They then gave Andre the choice of facing the police or a three-on-one fight as discipline for his misconduct. Andre chose the fight. If Andre had refused to face them, they told him they would have taken their evidence to the police, putting him at risk of criminal prosecution.

The three drove Andre to a secluded area in Idyllwild called Pine Cove. They arrived after dark. Andre stripped down to his boxer shorts and removed his shoes for the fight. Andre was permitted to fight back, and he threw the first punch. All three punched and kicked Andre during the fight, but none had weapons. According to Cody, when the fight was over, Andre sat on the ground. He was bleeding, but he was talking and coherent. The other three men left Andre there.



Consistent with an agreement of the parties, the trial court read a statement about the extent of Andre's very serious injuries. The court said after the beating, Andre "contacted a nearby resident in the Idyllwild area. This resident contacted police, who also contacted and dispatched an ambulance. [Andre] was transported to a local hospital and was treated by a doctor. If called to testify, that doctor . . . would testify that [Andre] was suffering from nasal bone fractures, upper jaw fractures, swelling and bruising to his inner cheek area, as well as a fracture to his orbital bone area beneath his eye. [Andre] also suffered from facial lacerations and three lacerations to his scalp, which were treated with staples."

Though this brutal fistic encounter bore no relation to the incidents with Todd and Tyler, the trial court allowed evidence about it for the purposes of impeaching Cody's credibility and undermining appellants' self-defense and defense-of-another defenses by showing they had the intent to kill Todd.

***F. Making the Tap Daddy's Dispute a "Club Issue"***

The incident at Tap Daddy's resurfaced on August 29, 2010 when Jason and his girlfriend, Lindsay, ran into Tyler and Greg at a gas station near the Brown home. The short version is Jason told Tyler he was still upset about the way his father had treated Shaun. When Tyler told his father about the comment, Todd became angry, tracked Jason down, and heatedly told Jason he was making the dispute a "club issue," purporting to escalate the personal dispute into a dispute between their motorcycle clubs.

Tyler, Lindsay, Shaun, and Cody testified about different parts of these events.

1. *Tyler's account of how the dispute became a "club issue"*

Tyler said on August 29, 2010, he encountered Jason at a Shell station located on the corner of Lincoln and Florida, about a five minute walk from his home. Tyler had walked to the Shell station with Karl to "get a drink and smokes." Jason was inside with a woman (identified by others as Lindsay) and began speaking to Tyler at the cash register. Tyler said he had never seen Jason before.

When everyone was outside, Jason approached Tyler, shook his hand, and asked how Todd was because "[h]e thought my dad was in the hospital seriously hurt." Tyler called his father to make sure he was alright, but did not reach him. Jason then told Tyler, "Him and his boys were still pissed off at what happened that night at Tap Daddy's." Jason said this in a "straightforward, deep voice," and it was clear he "wasn't happy." Tyler responded, "I'll let my dad know." According to Karl, the conversation took about 10 minutes. Tyler said he remained calm, but took Jason's remark as threatening.<sup>8</sup> Tyler and Jason shook hands, and Tyler walked home with Karl where they hung out and waited for Todd to return. Karl said Tyler did not seem angry.

Todd returned home from work about four hours later. Tyler told his father what Jason had said, and Todd reacted angrily. "He was pissed off that he would tell me that. He was mad that Jason would tell me that, that he would come at me instead of telling my

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<sup>8</sup> Tyler had previously told an investigator things were "cool" after his conversation with Jason. He did not tell the investigator Jason had said he and others were still angry about the incident at Tap Daddy's.

dad.” They “hung out for a little bit, waited for him to take a shower” and then “went over to Psycho’s house” so Todd could confront Jason. Psycho was the nickname of Jason’s friend who lived nearby.<sup>9</sup> Tyler believed Jason went to Psycho’s from the Shell station based on the direction he took when he rode off. Todd, Tyler, and Karl all drove to Psycho’s house in Todd’s truck.

When they arrived, they saw Jason’s motorcycle parked in front. Tyler said, “My dad jumped out, told us to stay in the street while he went up there and knocked on the door.” “Psycho came to the door, and my dad asked for Jason.” When Jason came out, Todd confronted him. Tyler did not remember the details, but did remember Todd yelling, “Whose fucking bike is this?” calling the motorcycle a “piece of shit,” and telling Jason to stop messing with his son or he would take Jason’s bike. He also remembered Todd saying the incident was a “club issue” and Jason should “call his ‘P,’” meaning the president of his motorcycle club. According to Tyler, Jason responded by getting on his cell phone.<sup>10</sup>

After the confrontation, all four left and returned to Browns’ house. After about an hour, they got back into the car to get pizza.

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<sup>9</sup> Psycho appeared at trial, but invoked his Fifth Amendment right not to testify.

<sup>10</sup> Tyler earlier told police he did not hear his father tell Jason he should call his club president. At trial, he said he denied it “because [he] was nervous.”

2. *Lindsay's account of how the dispute became a "club issue"*

Jason did not testify at trial, but a woman he was dating at the time, Lindsay, was present for the conversation at the Shell station and the confrontation at Psycho's house and testified about what she witnessed.

Lindsay said she rode with Jason to the Shell station late in the afternoon on August 29, 2010. Inside the minimart, Jason and Lindsay ran into Tyler and a friend. Lindsay knew Tyler through his sister, but did not know Karl. Jason approached Tyler and said, "'Hey,' and he sent his condolences to him for his dad being in the hospital." Tyler responded, "My dad's not in the hospital." The two appeared to be confused, but the conversation ended there until everyone had left the minimart.

Outside, Tyler and Jason started talking again. Lindsay said, "They were talking about an incident that had happened a few months back. And I wasn't there for that incident, so I don't really know." She said she later learned it was an incident at Tap Daddy's. Lindsay said she was not paying much attention, but said Jason said something to Tyler "about his blood boiling." Jason and Tyler then shook hands. Lindsay described the conversation as friendly. Afterward, Tyler and his friend walked north up Lincoln, and Jason and Lindsay "[g]ot on the bike and went the same direction to Psycho's."

When they arrived, they found Psycho, his wife and their two children home. According to Lindsay, Tyler and Karl showed up about ten minutes later, with Todd. She first knew Todd and his crew were there because she heard "banging on the trailer and some yelling outside." She heard someone yell, "Who the fuck's bike is this?" and

recognized Todd's voice. "Psycho opened the door, very upset because of the banging on his house and the yelling outside" and found Todd, who asked to see Jason.

Jason went outside and walked to the end of the driveway to talk to Todd. Lindsay stayed near the house and could hear only pieces of the conversation and said she did not remember much of what they said to each other. She did say Todd was dominating the conversation, was talking down to Jason, and at one point said, "I'm making it a point to make it a club issue." Todd then told Jason to call the sergeant at arms of the Brotherhood. Lindsay remembered Jason responding, "Okay," and Todd leaving.

After they left, Jason "came inside Psycho's house very angry and was talking on his phone." She believed he was talking to Shaun, but did not hear what they said. She described him as angry and nervous. He was on the phone less than five minutes, then said he was going to Shaun's place and left. Lindsay stayed behind with Psycho and his family.

Between 10 and 20 minutes later, Cody showed up driving Jason's Suburban. Cody came inside the house and handed Psycho a revolver. Psycho thanked Cody for the gun, which he said was to protect his family. Cody then left. Lindsay left for home about 30 minutes to an hour later, she believed around 7:00 p.m. or 8:00 p.m.

### 3. *Shaun's account of how the dispute became a "club issue"*

Shaun spent most of the day Sunday, August 29, 2010, moving to a new house. He was busy moving between 8:30 a.m. and 8:00 p.m.

Late in the day, Shaun received a call from Jason, who told him about his conversation with Tyler at the Shell station and about later being accosted by Todd at Psycho's house. Jason also reported Todd had said the dispute was now a "club issue." According to Shaun, "[a] 'club issue' is an issue between two separate [motorcycle] clubs. Most of the time it could be handled verbally but, if it gets too out of control, could end in violence." A dispute between members of different clubs is not necessarily a club issue. "Someone has to declare it."

Shaun was brought into the dispute because he was sergeant at arms of the Brotherhood. Once Todd declared the dispute a club issue, Shaun understood his job was to find out what happened and get to the root of the problem. Shaun said declaring something a club issue can be a big deal. "It sends up an alarm that something potentially bad could happen if it doesn't get fixed." He said Jason "sounded worried and anxious, scared," as well as angry. He told Jason to try to calm down and meet him at his new house.

At Shaun's place, the two talked more. Shaun said Jason "was angry, but he was very scared and worried about what could possibly happen." Jason told Shaun he had seen Tyler at a gas station and offered his condolences to Todd, believing him to have been in a car accident. Jason told him the conversation was friendly and said they parted after shaking hands. Shaun did not say Jason told him he raised the Tap Daddy's incident with Tyler. Based on Jason's description, Shaun said he did not believe the gas station encounter caused the problem.

Shaun offered to tell the jury what Jason told him about the confrontation at Psycho's house, but the court excluded his testimony on hearsay grounds. Johnny, another associate of the Brotherhood and a friend of Todd, overheard parts of the conversation and the court allowed his testimony. He said Jason reported Todd had called the Brotherhood a "pussy club." Johnny said Jason was very angry at Todd and said he wanted "to fuck him up." At a police interview Johnny had reported Jason said something like, "I'm gonna fucking kill him," but he qualified he was not using Jason's exact words and, at trial, said that turn of phrase was only his interpretation of Jason's angry rambling. Johnny offered to reach out to Todd to try to smooth things over, but Shaun talked Jason down and reassured Johnny everything would be okay.

After hearing Jason's story, Shaun said he believed "there's a possibility that there could be a problem between my club and Todd Brown's club." "Just the mention of club issue, it raises red flags that there's a possibility that there can be violence . . . So, I was trying to get as much facts from Jason as I could about what had happened and why it happened." As a result, Shaun "told Jason that I wanted him to take me to his friend Psycho's house so I can get a perspective from somebody who wasn't in the club." He said he also wanted to make sure Psycho and his family, who were not club members, were okay. The two got on their motorcycles and headed to Psycho's house, with Jason leading the way.

4. *Cody's account of how the dispute became a "club issue"*

Cody said he was helping Shaun move early on August 29, using Jason's Suburban to take items to the new house. In the afternoon, Cody knocked off and went to spend time at a friend's house nearby.

Later, Jason called Cody from Psycho's house in an agitated state. He said Todd had shown up at Psycho's and threatened him. He told Cody Todd was associated with the Vagos and had announced he was making his disagreement with Jason a "club issue." Before the call, Cody did not know Todd or Psycho. Nor did he know Tyler or his friends Karl and Greg.

Jason asked Cody to bring a gun to Psycho's house so Psycho would be able to protect himself and his family if members of the Vagos returned. Cody said what Jason told him on the call made him fear for his safety. Nevertheless, he retrieved a Colt .32-caliber handgun and bullets belonging to Jason and took them to Psycho's house. Cody also armed himself with a Glock nine-millimeter handgun. When Cody arrived, Psycho looked nervous, could not sit still, and kept peering out the windows. Psycho told Cody about the confrontation, which again made Cody fear for his own safety. Cody asked Psycho what Todd drove, and Psycho told him it was a black Toyota truck.

At the time, the Vagos had been publicly accused, including in news reports, of making bold and violent attacks on the Hemet police. Cody said he had heard it reported the Vagos ran a gas line into a police department, attached a zip gun to the fence bordering the police parking lot, and put a rocket launcher on the roof of a building



across the street from the police department. He also heard from a police officer he met at the gym his mother owned that the Vagos had attached a pipe bomb to the undercarriage of an undercover police vehicle. Cody said he believed the Vagos had committed those acts at the time, and that he became alarmed on hearing of Todd's threat.<sup>11</sup>

After leaving Psycho's house, Cody drove to Shaun's new house, where he found Shaun, Jason, and another person talking outside. As Cody was getting an item from his vehicle, he heard motorcycle engines start. Jason said they were going back to Psycho's house. Jason and Shaun pulled out, and Cody followed in the Suburban about a half-block behind them. A friend rode along as a passenger.<sup>12</sup>

### ***G. The Shooting***

As these men converged, their accounts diverged. Tyler, Greg, Karl, Shaun, and Cody all testified about the fight and shooting, and we set out each of their accounts separately to underscore the differences.

#### *1. Tyler's account of the shooting*

Tyler said after the incidents at the Shell station and Psycho's house, he and his father and friends left the house and drove together to get pizza. The Browns lived on Woodrow Way on the block east of Lincoln and one block south of Palm. From

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<sup>11</sup> Cody said he learned in June or July 2011 the Vagos were not responsible for the attacks on the Hemet police reported in the local news.

<sup>12</sup> Cody's friend appeared at trial, but invoked his Fifth Amendment right not to testify.

Woodrow, they turned left on Lincoln and started driving toward the Shell station on the northwest corner of Lincoln and Florida Avenue. However, Todd turned the truck around before reaching the gas station.

When they had almost completed their U-turn, Tyler heard and saw two motorcycles ahead of them, going north on Lincoln. The motorcycles stopped at the stop sign on Lincoln at the intersection with Palm. Tyler said his father saw the motorcycles and pulled up to them. Tyler said his father's truck was angled only slightly (to about 1 o'clock) when he pulled up next to Jason and did not cut Jason off. Jason stayed at the stop sign for only a split second before he crossed the intersection. Shaun stayed stopped to the right of the truck.

A melee ensued. According to Tyler, his father raised his arms as if to say "what's going on?" Shaun did not respond, but "reached for my door, and then my dad looked over and said, 'Fuck that,' and jumped out." Todd ran around the front of the truck, "and hit him in his helmet." Shaun "fell over and his bike went into my dad's truck, and I jumped out and everybody else jumped out. We tried to—wrestling with him, and he knocked Karl to the ground." Shaun got on top of Karl and started hitting him, and Tyler grabbed Shaun from behind to pull him off Karl. During this, Todd was just standing near the front of the truck on the right side.

At that point, a Suburban pulled up behind Todd's truck. Tyler "looked over at my dad and my dad ran to the opposite side of the truck," the driver's side. "[T]hen he yelled at everybody to 'Run, guns, guns, run.'" Tyler ran east on Palm and turned south

after the second house. He said he ran through the second house to get back to his street, where he ran into a neighbor's house.

On direct examination, Tyler said he did not see Jason shooting, but heard him shooting as he ran and felt “[g]un blasts on the side of my legs, rocks, whatever it’s called,” but he was not struck by any bullets. He said, “like there was bullet fragments hitting the ground or whether bullets hitting the ground and shooting up rocks or—I don’t know what it was that was coming up. I know he was shooting.” On cross-examination, he said he saw Jason with a gun and saw him firing it. He also reported hearing shots come from the location behind his father’s truck, but he did not see that shooter.

Tyler did not see what his father or his father’s truck did as he ran, but he heard the truck “Skid out. I heard him slam on the gas and just the tires spinning.” He learned from law enforcement later that his father had been killed.

Before trial, Tyler gave statements to law enforcement on three or more occasions and testified at the preliminary hearing. At trial, he admitted to giving different answers related to important details of the fight and shooting, including the following discrepancies.

First, Tyler told police Shaun got off his motorcycle and opened Tyler’s door, and Tyler responded by getting out and hitting Shaun. At trial, he said Shaun reached for the door from his motorcycle, and his father got out of the truck and hit Jason, knocking him off the motorcycle.

Second, Tyler told police he pushed and hit Shaun before Shaun tackled Karl. At trial, he said he grabbed and hit Shaun only afterward.

Third, Tyler told police he didn't see Jason after he went through the intersection and did not see where the gunshots came from. At trial he said he saw Jason shoot at him.

Fourth, Tyler told police he did not see anyone with a firearm. At trial, he said he saw Jason shoot at him. He claimed the testimony was consistent because he "didn't see the firearm. I just seen the fire blast."

Fifth, at trial, Tyler said his father had warned them to run, yelling "Guns, guns, guns." Tyler did not tell police about this warning, explaining at trial that he "didn't want to talk about it."

Sixth, Tyler initially told police Greg was not with him at the shooting. At trial, he admitted this was a lie. He said he lied because Greg had a new job and asked Tyler not to bring him into it. In a later interview, Tyler told police Greg *was* at the shooting and said he had lied to protect Greg's life. When reminded of that statement at trial, he changed his story and said he had lied to protect Greg's life, not his new job.

## 2. *Greg's account of the shooting*

Greg was not present for the conversation between Tyler and Jason at the Shell station or the confrontation at Psycho's. Tyler called him later to ask him to come over, saying "some guys were starting trouble with him" and he wanted Greg there "just in case anything happened."

Greg went over to the Browns' home about five minutes later, he estimated between 7:00 p.m. and 8:00 p.m. When he arrived, Tyler, Todd, and Karl were already there. According to Greg, "[a]s soon as I showed up at Todd's that night, Tyler said that a guy named [Jason] wants to kick my ass and all this stuff because he said I was a liar." Greg said they hung out together for about 20 minutes, then Greg, Tyler, and Karl drove around the neighborhood because "Todd told me—he said he thinks there's people watching his house." They found nothing, returned to the house, and then all four left in Todd's truck to get pizza.

As they left, they turned left on Lincoln, heading south. When they got near the Shell gas station, they saw two motorcycles turn left onto Lincoln from Florida. Greg said Todd pulled a U-turn after the motorcycles passed and they ended up following the motorcycles north on Lincoln at a distance of about 20 yards. The motorcycles were travelling at a normal speed and Todd increased his speed after the turn. Greg said the motorcycles stopped at the intersection of Lincoln and Palm, and Todd stopped his truck between them. Lincoln is a north-south running street with one lane going in each direction. Jason "took off up Lincoln and then turned right at that point," leaving Greg's view. Greg said Todd did not try to hit either motorcycle or run either motorcycle off the road.

Tyler sat in the front passenger seat with his window down. Greg recognized the motorcyclist on the right as Shaun. He said Todd, Tyler, and Shaun exchanged words through the open window. "Todd was saying, . . . 'What the fuck are you driving by my

house for? Why are you guys driving by my house?” Greg could not hear Shaun’s response, but said both sounded hostile. “At that point [Shaun] had his hand on the door. Tyler pushed his way out—and Todd—I remember Todd getting out of his side. [¶] And they ran over there, and they started fighting . . . And Karl was out.” Greg got out last, through the driver’s side door, “and that’s when I had seen [Shaun] on the ground on top of Karl . . . really giving it to him.” Greg said he entered the fight to help Karl.

At that point, Cody drove up in the Suburban. “I was trying to yank on [Shaun], to yank him off Karl. And at that point I remember real quickly a truck came right up in back of us—I’d say five feet away from us—and screeching marks, like they hit their brakes really abruptly, got out.” Greg said someone got out of the driver’s side of the Suburban, but he did not recognize the person or see what he did. “And then I looked back at Todd, and I seen Todd say, ‘Gun.’ And he said ‘Run.’ [¶] . . . [¶] And I took off running.” He started running north on Lincoln, toward Jason, but when he realized someone was there shooting, he turned right and headed east down Palm. Tyler ran off in the same direction.

Greg said the shooter (later identified as Jason) shot at him as he ran past the house located on the southeast corner of the intersection. Greg said, “[W]hen I’d ran from the truck over this way, the first—the first house on the corner had a mailbox. And I hit gravel out front. [¶] And I remember the shooter—when I was running, I looked over—and I remember him pointing his gun at me, and he just kept firing at that point. [¶] And I remember gravel—I’m not sure if it was gravel or the mailbox fragments—

hitting me in the face when I was running.” He thought he heard shots behind him from the Suburban, but he was not sure.

Tyler turned into the second or third house down Palm, and Greg ran a little further and turned into another house. Greg did not see what Todd did after he yelled his warning and they ran.

3. *Karl’s account of the shooting*

Karl said around 8:00 p.m. he left the Browns’ house with Todd, Tyler, and Greg to get pizza.<sup>13</sup> As they drove down Lincoln, Karl heard and then saw two motorcyclists driving behind them. The motorcyclists turned around and started driving the opposite direction. Todd made a U-turn to follow them. Shaun stopped at the intersection of Lincoln and Palm and Jason drove through it. Karl said Todd stopped his truck at an angle and to the left of the motorcycle, got out, and exchanged words with Shaun.

Todd punched Shaun, and then Karl and the other occupants of the truck got out and started fighting him too. Karl said Shaun grabbed his leg and pulled him to the ground and punched him. They continued to fight and Tyler grabbed at Shaun’s side. An SUV pulled up behind Todd’s truck. Karl saw the driver’s side door of the SUV open, then heard gunfire. Karl said he saw Jason’s motorcycle and saw Jason walking and firing a gun at Todd. He said Todd got in his truck, turned left, and drove west on Palm.

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<sup>13</sup> As we noted, Karl testified at the preliminary hearing, but did not appear at trial. The parties read his testimony for the jury.

He said he saw Jason firing at Todd as Todd drove away down Palm and into a field.

Karl then returned to the Browns' house by walking south down Lincoln.

4. *Shaun's account of the shooting*

Jason and Shaun headed for Psycho's house driving east on Palm. At Lincoln, Jason turned right—going south—and Shaun followed. The turn was a mistake; Psycho lived a block north of Palm, so they used a cul-de-sac off the east side of Lincoln to turn around.

Jason was slightly ahead. As Shaun attempted to turn back onto Lincoln headed north, "A black vehicle approached" from the south and "headed towards me, like, swerving at me." Shaun continued north on Lincoln, but the truck overtook him. He said the truck "took up most of all of my lane, and I had to squeeze myself closer to the curb—almost into the—like, the rain gutter of the curb." Shaun recognized the driver as Todd and the person in the passenger seat as Tyler. Shaun said Todd "was crowding me against that curb" with the truck and Tyler hung out the window screaming something like, "What the fuck are you doing in my neighborhood, motherfucker? We're gonna get you."

Shaun tried to accelerate to get around the truck, but Todd matched his speed. "As I would accelerate, he would accelerate. If I was to slow down, he would slow down. And any time I would start getting ahead of him, he would crowd me closer to the curb." Ultimately, Todd pulled ahead of Shaun slightly, and, at the intersection of Palm and Lincoln, Todd's truck "cut me off at about a 45-degree angle." Shaun said he stopped



“[b]ecause I couldn’t proceed forward anymore without hitting his truck.” Shaun indicated on a map where Todd cut him off and where they came to a stop at the southeast corner of Palm and Lincoln. Shaun and his motorcycle came to rest just below Palm, next to the right-hand curb on Lincoln. Todd’s truck jutted into the intersection, pointing northeast, as if making a right-hand turn from Lincoln onto Palm. Shaun agreed with the other witnesses that Jason had gone through the intersection and continued north on Lincoln.

The Browns and friends proceeded to attack Shaun physically. Shaun said, “As both of our vehicles stopped, the passenger, Tyler Brown, had exited his vehicle.” Shaun said Tyler “went around the front of my motorcycle—approached me from the right side—and as my attention was drawn to him to protect myself, . . . I was knocked over to my right and my bike fell over to my left . . . towards the truck.” Shaun later learned Karl was the person who knocked him over. When he was on the ground three people started punching and kicking him. “I was being kicked. They were kicking me in the ribs . . . And they were trying to kick me in the face, but I was on my knees and I was blocking my face with my arms and my hands.” Shaun said he had lost track of Jason during the fight.

Shaun fought back. He said he “grabbed [Karl] who was kicking me by his leg and pulled him underneath me—or pulled him to the ground—and I got in what they call a mount position, and I got on top of him and started delivering my own blows.” At that point, Shaun said Todd punched him in the face from his right before moving off

somewhere behind him. “After he went—left my field of view, a vehicle with his brights on approached from the south.” He said the vehicle “was a truck, and it had the four head-beams or four headlights on” and “the area where we were fighting got really lit up.”

Within a couple seconds of the truck pulling up, Shaun heard a gunshot come from its direction. After the gunshot, “[t]he people that were hitting me started moving, started leaving,” he and Karl remained where they were, and Todd’s truck started moving. Shaun said Todd’s truck started after the second or third gunshot which came from the direction of the vehicle with its high beams turned on. After Todd’s truck began to move, he heard a volley of gunshots coming from north of Palm. Shaun said he did not run when the gunshots rang out from the north because there were “no bullet strikes on the ground around me. Being shot at—if you’re being shot at, it makes a distinct sound—as opposed to just gunfire.” “If a bullet is close enough to your head or to your ears and it passes your person, it sounds like a clap.” He did not hear any such noises and also said there were “no rounds skipping off the ground or debris coming up and hitting around me.”<sup>14</sup> After the shooting ended, he let Karl get up and run off. Law enforcement arrived within a couple of minutes and detained him.

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<sup>14</sup> Shaun had combat experience with the Marines in Iraq. His testimony that he knew he was not in the line of fire is based on that experience. However, the trial court (erroneously in our view) barred Shaun from testifying that his belief was based on his combat experience.

5. *Cody's account of the shooting*

Though Psycho's house is located on Harvey Way, one block north of Palm just off Lincoln, Jason and Shaun turned right on Lincoln, headed south. Cody followed the motorcycles, but shortly after he turned onto Lincoln, he saw Jason and Shaun go by in the opposite direction. Cody said a black Toyota truck then "blew by me on my left-hand side going north." Cody noticed the truck matched Psycho's description of Todd's vehicle and said to his passenger, "I think that's Todd's truck."

Cody looked over his left shoulder out the driver's window to see what was happening. He saw Jason drive through the stop sign at the intersection of Lincoln and Palm. He said he saw Shaun's bike "closest to the curb and the black truck on the other side of him," but "a little ahead." They were going fast. Then he saw Todd's "truck come out a little bit to the left and swerve all the way to the right." Cody said, "as the truck came across in front of him, I saw [Shaun's] bike, the headlights and everything—it looked like they went into the truck," which made him exclaim, "Oh, shit. He just hit Spicher." Cody described how the vehicles came to a rest and depicted their placement on a photograph of the location for the jury. According to Cody, Todd's truck cut Shaun's bike off at the southeast corner of the intersection of Lincoln and Palm, with Shaun pushed up against the curb just south of Palm. Todd's truck came to rest pointing northeast, and jutting into the intersection.

When he saw what he believed to be the collision, Cody made a 3-point turn and drove back to the intersection. As he drove up, he turned on his high beams. Cody said, “as I came up, I saw three—three people on Shaun and one underneath.” Shaun was to the right of the truck on the east side of Lincoln. Cody could see Jason across the intersection in the north-bound lane of Lincoln, a little south of a power pole. “Before I came to a stop I saw [Todd] leave the pile that was on top of [Shaun] . . . [and] run around the front of the Toyota.” Todd went to the driver’s door, “leaned inside the driver’s side from his waist up . . . and then he came back out.” Todd then came around the back of the truck to the tailgate just as Cody was coming to a stop. Cody said Todd appeared to have something in his right hand, but he could not tell what it was. He said he was sure it was not a gun, but he could not tell if it was a knife, screwdriver, or crowbar. He said the object shined in the headlights like chrome.

When he stopped the Suburban behind the Toyota, Cody left his high beams on and could still see Jason and Shaun. Cody said Shaun was “on top of one individual and two individuals [were] on top of him” and Todd was “still cutting [between] the vehicles,” but headed for Shaun. Cody said he stuck his left hand out the window with the Glock and fired a warning shot into the air. He said he neither aimed nor shot at Todd. Todd stopped and ran back to the driver’s side of the Toyota truck. However, the two people on top of Shaun did not run. Cody said he then got out of the Suburban and fired a second shot into the air. He said he did not aim at anyone.

Todd got in his truck and took off. Though the truck was pointed northeast on Palm and nothing blocked its progress in that direction, Todd turned to go north on Lincoln. Cody said as he fired the two shots he could see Jason illuminated in the headlights, running toward the fight. Cody said the truck's tires squealed as Todd took off and the truck went "straight at [Jason]." "As the truck came straight at him, [Jason] pulled his firearm and fired at the front of the truck." The truck did not stop. "As Mr. Schlig started firing into the truck as it was coming at him, . . . I fired four more shots into the back of the vehicle. And then the vehicle started to turn left." Cody said he fired the four shots "trying to stop Todd from killing Jason."

The turn Todd attempted was too sharp for his speed. "As he turned the wheel, the bed of the truck started to slide toward" Jason and did a fishtail, the back end still moving toward Jason. Cody said, "As [Todd] made his left-hand turn, he was trying to correct from going too fast to the left by turning the wheel as hard as he could to the right." Cody "could see him turning his wheel frantically all the way to the right, trying to correct his too-quick-of-a-turn to the left."

Cody said he stopped firing when Todd turned left. According to Cody, he still had five rounds in his gun when he stopped firing. Cody's testimony about when Jason stopped firing was not as clear. He said Jason was still firing when Todd turned left. First he described Jason as stopping "just [as the truck] left the intersection" headed west "down Palm." Later, he said when "the bed of the truck was still sliding around, [Todd]

actually had to back up a little bit, [Jason] fired the rest of his shots. [¶] By the time the truck was done sliding and was ready to approach forward, he was done firing.”

When Todd drove away from Jason, he initially drove too far to the left, heading southwest into the eastbound lane on Palm. He then curved back to the right, before driving over a fence and coming to rest in a field on the north side of Palm and the west side of Lincoln. Todd drove in a rough S-curve from the southeast corner of the intersection, to the northeast of the intersection, back down to the eastbound lane of Palm on the west side of the intersection, and then curved back across Palm and into a field on the north side of Palm. According to the map provided by police, Todd left Palm about 172 feet to the west of the northeast corner of the intersection.

After Todd’s truck drove into the field, Cody got into the Suburban. Shaun was still fighting, and Jason was standing in the northbound lane of Lincoln in the intersection. Cody drove north on Lincoln and stopped to ask if Jason was alright. Jason “was still facing the truck as it was in the field.” Cody said Jason “flipped around” and pointed the gun at him. Cody said, “Don’t point that thing in my face” and drove off northbound on Lincoln.

#### ***H. The Aftermath of the Shooting***

After leaving the scene, Jason called Lindsay for a ride. Lindsay, her brother, and her brother’s girlfriend picked him up a few blocks from the shooting. Jason was extremely out of breath, looked shaken up and excited, and spoke rapidly. They drove back to Lindsay’s house. Cody went to his sister’s place and called Jason. He said he did

not call 911 because the Vagos were involved and he feared retaliation. Later, he met Jason at Lindsay's house.

According to Lindsay, Jason said he had emptied three clips from his gun in less than a minute in the direction of Todd's truck, and he thought Todd was dead. Lindsay said Jason was excited and appeared to be bragging. Lindsay's brother's girlfriend said Jason reported firing one and a half or two and a half clips. Lindsay also said she heard Cody say he was involved in the shooting, and had gotten down on one knee and fired four times at Todd's truck. Cody was excited and seemed to be thrilled as he spoke. The two did not say anything to suggest they had planned an ambush or assault.

Cody said he stayed for about half an hour and then left for Shaun's house. He knew Shaun had been arrested and wanted to protect Shaun's wife and daughter from the Vagos. Cody stayed overnight and at five or six in the morning took Shaun's family to a friend's house. A few hours later, he took Shaun's daughter to her grandmother's house in Joshua Tree. When he got back to Hemet, Cody returned the Suburban to Jason at Lindsay's house.

Neither Cody nor Jason wore a bullet proof vest at the shooting, but Cody said he bought two of them afterwards. On the weekend of Todd's funeral, Cody said he went to Palm Springs because a lot of Vagos members would be in Hemet for the funeral. He wore his bulletproof vest and took a firearm with him. Law enforcement arrested him while he was in Palm Springs.

## ***I. The Physical Evidence at the Scene of the Shooting***

Officers with the Riverside County Sheriff's Department responded to reports of the incident and processed the crime scene.

### *1. The victim and the truck*

Officers found Todd's truck in a field with its headlights on and the engine running. The truck appeared to have driven off the road on the north side of Palm, over some bushes, and through a fence. Law enforcement measured the hole in the fence as being approximately 172 feet west of the utility pole on the northeast corner of Lincoln and Palm, which they used as the point of reference for measuring the location of all items found at the scene.

The deputies found Todd inside the truck with his left arm resting on the driver's side door, his right arm at his side, and his head slumped forward. He had a bullet hole in the back of his head, and the officers—unable to detect a pulse or breathing—concluded he was dead.

The detective who processed the truck observed two places where a bullet struck the rear tailgate of the truck. One bullet entered the tailgate but did not exit, and the other passed through the tailgate. The detective also observed multiple places where bullets struck or penetrated the front, passenger side, and rear window of the truck. The detective also observed a fired bullet and a copper jacket from a fired bullet in the bed of the truck, and found spent bullets inside the cab. Inside the passenger compartment, the detective observed one of the bullets had entered the rear window, passed through the



rear passenger headrest and the driver's headrest. The detective said he could not say precisely how many bullets had struck the truck, but estimated seven or eight.

## 2. *The location of shell casings*

Officers recovered multiple casings and bullet fragments from the scene, most grouped in two clusters.

They found five spent nine-millimeter shell casings on Lincoln, south of Palm, scattered around the center line just to the southwest of the word "STOP" painted on the east side of Lincoln. Their location corresponded roughly to where eyewitnesses placed Cody at the shooting. A sheriff's ballistic witness said these casings came from a Glock handgun of the kind Cody admitted firing.<sup>15</sup>

Officers also found 16 spent nine-millimeter shell casings scattered around the northeast corner of the intersection. Fourteen of those casings were grouped together on Lincoln, about nine to 18 feet north of the utility pole at the northeast corner of the intersection. Ten of those casings were off the street on the walkway, and the other four were in or near the gutter. The two remaining shell casings were separated from the larger group. One of them lay just outside the gutter and about six feet closer to the intersection than the southernmost casing in the larger group—just 14 inches north of the utility pole. The final casing lay much farther into the intersection, three feet five inches to the south and 13 feet six inches to the west of the utility pole. Unlike the other

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<sup>15</sup> Cody admitted firing six shots and finding one casing on the vehicle he was driving.

casings, it lay directly in the path of vehicles turning right onto Lincoln from the westbound lane of Palm.<sup>16</sup>

A criminalist with the Department of Justice analyzed 22 nine-millimeter shell casings as well as expelled bullets recovered from the scene. Five of the shell casings had elliptical or oval-shaped firing pin impressions, and the remaining 17 had hemispherical or round shaped firing pin impressions. Based on the similarity of the firing pin impressions and the correspondence of marks left on the shell casings as they were ejected, the criminalist concluded the five shell casings with elliptical firing pin impressions were fired from a Glock handgun, and all 17 of the shell casings with the hemispheric firing pin impressions were fired by another gun or guns.

### 3. *The bullets which struck nearby mobile homes*

Officers also discovered two nearby trailer homes had been struck by bullets.

One bullet struck and entered a mobile home unit located on the south side of Palm, four lots west of the intersection. The bullet struck on the east side of the home, toward the north, near Palm. Officers recovered the bullet from the residence.

Another bullet struck and passed through the mobile home unit located on the southeast corner of the intersection. The bullet struck on the north face of the unit, passed through diagonally, and exited through the east wall of the home.

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<sup>16</sup> Officers later found an additional shell casing 77 feet north of the utility pole.

#### 4. *The cause of death*

Todd's autopsy revealed scrapes to his face and gunshot wounds to his left hand and the back of the head. The bullet that entered the back of his head passed through the middle part of his cerebellum, the pons or midbrain, and the medial aspect or middle part of his frontal lobes. The coroner recovered a medium-caliber jacketed bullet from the left parietal part of his brain. The coroner determined a gunshot wound to the head caused Todd's death, and he died almost instantaneously.

The criminalist concluded the bullet removed from Todd's skull was a general classification .38-caliber, and had the weight, shape, and appearance of a nine-millimeter Luger bullet. The bullet had "five-right" twist markings that were consistent with a number of firearms including a Smith & Wesson semiautomatic pistol, but not consistent with a Glock handgun. The criminalist opined the bullet was not part of one of the five shell casings with the elliptical firing pin impressions (from Cody's gun), but could have been part of one of the 17 shell casings with the hemispheric firing pin impressions (from Jason's gun or guns).

The bullet that killed Todd passed, at a slight decline, through the rear window on the driver's side, the rear passenger's headrest, and the driver's headrest, before striking Todd in the back of the head.

#### 5. *The video surveillance recording*

Law enforcement obtained video and audio recordings from a surveillance camera in the vicinity. We have reviewed the recordings. The camera was not directed at the

crime scene, but does show the comings and goings of people involved as they traveled on Woodrow Way. The recordings include audio of the gunshots.

First, the video establishes the time period of the encounters at the Shell Station and Psycho's house. It shows Tyler and Karl walking toward the Shell station at 6:36 p.m. and returning at 6:53 p.m. Todd returned home just 13 minutes later, at 7:06 p.m. Todd's truck left again, presumably for Psycho's house, less than five minutes later, at 7:10 p.m.<sup>17</sup> His truck returned at 7:16 p.m. Greg's vehicle arrived and parked across the street from the Browns' house at 7:49 p.m., left at 8:16 p.m., and returned at 8:21 p.m.

Second, the video establishes the time period of the fight and shooting. Todd's truck departed Woodrow at 8:32 p.m. Two motorcycles can be heard from 8:33 p.m. to 8:34 p.m., apparently going past Woodrow and then returning in the other direction less than a minute later. Eighteen seconds later, a gun fired twice, followed by a barrage of other shots. The gunshots stopped 11 seconds after the first shot. Fourteen seconds later, you can hear one final gunshot. A motorcycle started one minute later. Forty seconds later, Karl ran eastbound on Woodrow. Law enforcement arrived at 8:38 p.m.

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<sup>17</sup> This timeline contradicts much of Tyler's account of the timing of events. Tyler said they waited three or four hours after the conversation at the Shell station before Brown returned from work and waited longer after he returned before leaving for Psycho's house.

## ***J. Closing Arguments***

The prosecution relied heavily on the evidence concerning Jason's and Cody's involvement in the Andre beating to establish they did not act in Jason's defense and did not act in the heat of passion.

The prosecutor argued the evidence of that brutal beating showed Cody and Jason solve problems with violence. He acknowledged "it may have been strange that at the very end of the trial Mr. Young is on the stand and we hear about this thing that happened in July where [Andre] got beaten into submission by Mr. Young and Mr. Schlig." He then emphasized the severity of [Andre's] injuries—"broken bones, broken jaw, broken orbital, stitches, staples, [and] sutures." The prosecutor then explained they heard that evidence "because that tells us how these guys deal with problems – how Mr. Schlig and Mr. Young – how they deal with someone whose behavior has offended them. They hurt them. They gang up on them. They team up on them, multiple people on one person hurting that person. That's how they deal with problems that they don't like." "We can tell how these people involved in this case deal with their problems: Violence, injury, broken bones, disparate numbers, death, or yelling and punching."

The prosecutor argued the evidence of the beating undermined Cody's and Jason's primary defense—that they were both acting to defend Jason from being run down by Todd. The prosecutor argued, "And how else do we know this isn't a case of lawful self-defense? Andre . . . the man in front of the wedding photo holding the chain – the only one holding the chain. You are allowed to use this incident to consider what the intent

was in these defendants' mind when they pulled the triggers of their guns time after time after time."

The prosecutor returned again and again to this theme. He argued, "To deal with someone who had done wrong to them, they beat Andre . . . causing those severe injuries that were read to you. That's how these men deal with the problem or deal with someone whose behavior they don't find pleasing to themselves. When someone offends them, they get hurt bad. [¶] Todd Brown's murder was not an accident. It was not unexpected. It was not self-defense. It was an opportunity. It was an opportunity for Jason Schlig to kill the man who pissed him off and belittled him and called him names and said, 'I'll be driving your bike.' And Cody Young helped him out. Cody Young—who goes everywhere, does everything with Jason Schlig – 'I'm there. Hey, I've got a gun, too. I'll help you out.' [¶] This was the reality. This was the taking advantage of an opportunity to kill. Here's Todd Brown. Here he is, a sitting duck in his truck. Fire away. Because he had done us wrong. And this is what we do to people who have done us wrong."

The prosecutor returned to the Andre evidence to dissuade the jury from finding appellants had acted in the heat of passion. He argued the evidence of the beating showed appellants should not be convicted of the lesser included offense of voluntary manslaughter because they responded to provocation. "Why wasn't this the heat of passion? . . . [¶] Remember everything they did in advance—arming, protecting, seeking out, waiting till Todd was alone in the truck, a sitting duck in that truck as they

fired at him like a shooting gallery at that intersection. The murder was not the result of a surprise or chance encounter. This was the result of an opportunity taken advantage of. And what else tells us that is the Andre . . . incident. That's why that is, again, significant. When someone wrongs these men, they wrong them back tenfold.”

#### ***K. The Verdicts and Sentence***

The jury found Jason guilty of murdering Todd in the second degree (a lesser included offense of count 1), attempting to murder Tyler and Greg without premeditation, discharging a firearm at an occupied vehicle, and found true the firearm allegations. By reaching those verdicts, the jury necessarily rejected Jason's self-defense and heat of passion defenses. Had they credited the justification defense, the jury could have rendered a verdict no greater than voluntary manslaughter. Had the jury found Jason acted in the heat of passion, the jury could have rendered only a voluntary manslaughter verdict.

The jury found Cody guilty of voluntary manslaughter (a lesser included offense of count 1) and discharging a firearm at an occupied vehicle, and found true the firearm allegations. The jury could have reached the voluntary manslaughter verdict by accepting he acted in imperfect defense of Jason—that Cody believed Jason was in immediate danger of suffering great bodily injury, deadly force was necessary to defend him, but that Cody was unreasonable in his beliefs. (CALCRIM No. 571.) If the jury had found him reasonable in his beliefs, they would have been required to render an acquittal. (CALCRIM No. 505.) The jury's manslaughter verdict was also consistent

with finding Cody acted in the heat of passion. (CALCRIM No. 570.) The jury acquitted Cody of the attempted murders of Tyler and Greg.

The trial court sentenced Jason to a total indeterminate prison term of 35 years to life made up of an indeterminate term of 15 years to life for the second degree murder conviction, plus 20 years for discharging a firearm. The court imposed concurrent upper term nine-year sentences for each attempted murder conviction, plus 20 years for the discharge of a firearm for each. The court also imposed an upper term seven-year sentence on the conviction for discharging a firearm into an occupied vehicle, plus 25 years to life for personal use and discharge of a firearm, but stayed that sentence under section 654.

The trial court sentenced Cody to a total prison term of 16 years—a middle term sentence of six years on the manslaughter conviction, plus 10 years for the discharge of a firearm. The court also imposed a middle term sentence of five years on the conviction for discharging a firearm into an occupied vehicle, plus 15 years for personal use of a firearm, but stayed that sentence under section 654.

Jason and Cody both timely appealed.

## **II**

### **DISCUSSION**

#### ***A. The Admission of Evidence About the Uncharged Beating***

Appellants contend the trial court prejudicially abused its discretion by admitting evidence under Evidence Code section 1101, subdivision (b) (section 1101(b)) that they



participated in the July 2010 beating of Andre. Appellants argue the prior beating had no connection to the shooting of Todd, the two events had no similarities, and the evidence was not relevant to proving they intended to kill Todd. Appellants also argue the evidence was improper propensity evidence, and its prejudicial impact substantially outweighed any conceivable probative value.

We agree. The beating of Andre and the shooting of Todd shared no characteristics relevant to proving appellants intended to kill Todd when they shot at his truck. In addition, the evidence appellants deliberately drove Andre to a remote area and savagely beat him was highly prejudicial, within the meaning of Evidence Code section 352 (section 352), and the prosecution employed it to establish appellants were dangerous and violent.

*1. Additional background*

The prosecution presented four witnesses at an Evidence Code section 402 hearing who testified Cody, Jason, and a third man drove Andre to a remote area in Idyllwild and beat him as discipline for having sexual intercourse with an underage girl. The court ruled initially the prosecutor could introduce the evidence on cross-examination of appellants if they testified “they were surprised, that they were shocked, dismayed by the conduct of the [shooting] victim,” and to prove they “knew full well what the capabilities of each other were.”

During the prosecution's case-in-chief, Cody's attorney asked whether the prosecution would be permitted to introduce the evidence of the beating on rebuttal despite the bar on propensity evidence to prove absence of a mistake or to impeach Cody's testimony. The court ruled the incident was admissible to impeach Cody's testimony because "[t]he one thing [the members of the jury] need to be able to hear is information that would yield knowledge and an understanding in terms of whether the person that's making a declaration in court is to be believed or not to be believed." The court concluded, without further explanation, "I think that has extremely high probative value."

The court acknowledged admitting the evidence would impose some prejudice, but concluded it did not warrant exclusion. "Is there some prejudicial effect? Well, of course, there's some prejudicial effect. There's some consumption of time, as described by counsel[,]" there is the question "whether this incident is maybe more inflammatory than the present incident," and there is the potential for juror confusion. However, the court concluded it could limit the consumption of time by order. The court also determined the beating evidence was not inflammatory because it did not involve weapons and jurors would not be confused because the beating took place at a different location from and involved different victims than the shooting.

In the face of that ruling, Cody's counsel questioned him about the beating in his direct testimony. The prosecution then questioned Cody extensively on the subject. After the cross-examination, the prosecutor renewed his argument the evidence was

relevant under section 1101(b) because the beating was “done for club purposes” and, therefore, tended to establish the shooting was not an “unexpected, accidental, or unplanned” incident.

In the end, the trial court concluded the beating and the shooting had similarities sufficient to admit the evidence to negate appellants’ self-defense and defense-of-another claims. First, the court noted both incidents involved Jason and Cody “engaged in a course of conduct that involved at least two other people.” Second, the court noted “the victims in both instances are either members . . . [or] hang-arounds . . . of motorcycle gangs . . . And I think that’s significant because these are not people of gentility. These are people with a particular, if you will, allegiance or belief perceived to be allegiance. It appears to be some sort of separate set of rules, which is fine, but it makes it sufficiently distinct for me to find that it has some similarity.”

The court emphasized the defense case turned on the proposition appellants acted in defense of Jason. “[I]t’s not just that . . . the victim and his cohorts got out of the vehicle and then started striking [Shaun], but . . . the victim is alleged to have accelerated a motor vehicle . . . [to] attack[] the person across the street, [Jason]. [¶] That’s the key issue now for the jury, and that is intent. And it’s important for them to understand that these two defendants . . . have the capability, if you will, to act pursuant to a specified intent, and it is relevant.”

The trial court then conducted a truncated prejudice analysis under section 352. It concluded any prejudice from admitting the evidence had been minimized because Cody had already testified about it. However, the court limited further inquiry to avoid spending additional time on evidence about the beating.

The trial court instructed the jury it could consider the evidence of the prior beating for the purpose of evaluating credibility (CALCRIM No. 303) and determining whether appellants acted with the intent to unlawfully kill Todd, Greg, and Tyler (CALCRIM No. 375). The trial court warned the jury should not conclude from the evidence the appellants had “a bad character” or were “disposed to commit a crime.”

## *2. Legal Principles*

Evidence Code section 1101, subdivision (a) (section 1101(a)), prohibits admission of evidence of a person’s character, including evidence of specific instances of uncharged misconduct, offered “to prove his or her conduct on a specified occasion.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, fn. 1 (*Ewoldt*), superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) However, section 1101(b) permits evidence of uncharged misconduct to establish facts other than the person’s disposition to commit similar acts, such as defendant’s motive, intent, or the absence of mistake or accident. (*Ewoldt*, at p. 393.)

“When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule

or policy requiring exclusion even if the evidence is relevant.” (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) To be admissible, there must be a direct relationship between the prior offense and a disputed element of the charged offense. (*Id.* at p. 857.) If a prior offense is offered to prove an uncontested issue or an issue not otherwise in dispute, the evidence is not relevant and should be excluded. (*People v. Gonzales* (1968) 262 Cal.App.2d 286, 290.)

Here, there is no question that appellants’ intent was a material issue. To be guilty of murder or attempted murder, an offender must act with intent to kill. (*People v. Chiu* (2014) 59 Cal.4th 155, 166 [“First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty”]; *People v. Bland* (2002) 28 Cal.4th 313, 328 [“To be guilty of attempted murder, the defendant must intend to kill the alleged victim”].) Appellants’ defenses put intent in play. They admitted participating in the shooting, but said they shot at Todd in Jason’s defense and denied intending to shoot at Tyler and Greg. As a result, any evidence tending logically, naturally, or by reasonable inference to establish they intended to kill Todd, Tyler, or Greg would be relevant. (*People v. Harris* (2005) 37 Cal.4th 310, 337 [Evidence is relevant if it “tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive”]; see also Evid. Code, § 210.) Thus, we are left to determine the probative value of the beating evidence and its potential for prejudice.

The probative value of an uncharged offense to a defendant's intent in committing a charged offense derives from the "doctrine of chances." That doctrine holds "similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act." (2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 302, p. 241; see also *Ewoldt*, *supra*, 7 Cal.4th at p. 402, [quoting 2 Wigmore, § 302 with approval].) The argument reflects "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all." (2 Wigmore, § 302, p. 241.)

However, "it is at least necessary that prior acts should be *similar*. Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance." (2 Wigmore, *supra*, § 302, p. 245.) The test for determining admissibility is whether "the uncharged misconduct [is] sufficiently similar to support the inference that the defendant "probably harbor[ed] the same intent in each instance."""<sup>18</sup> (*Ewoldt*, *supra*, 7 Cal.4th at p. 402 [quoting 2 Wigmore, § 302].)

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<sup>18</sup> A greater degree of similarity is required to admit evidence of uncharged misconduct to show the identity of the actor or that the offenses share a common design or plan. (*People v. Kelly* (2007) 42 Cal.4th 763, 784.)

For example, in *People v. Robbins*, our Supreme Court upheld the admission of evidence defendant had previously kidnapped, molested, and strangled a 7-year-old boy as sufficiently similar to support the inference defendant had criminal intent when he later lured a 6-year-old boy onto his motorcycle and molested and strangled him. (*People v. Robbins* (1988) 45 Cal.3d 867, 880, superseded by statute on another ground as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

Without such similarity, however, evidence of prior offenses is not admissible to show intent. *People v. Simon* (1986) 184 Cal.App.3d 125, 130 (*Simon*) is instructive. There, the defendant faced a murder charge for shooting a man in his former girlfriend's house. (*Simon*, at pp. 127-129.) The prosecution theory was defendant had acted out of jealousy. (*Id.* at p. 130.) Defendant claimed self-defense. (*Ibid.*) The prosecution offered evidence of a prior incident where the defendant had pulled a gun on a man in the same woman's house when the two were still together. (*Id.* at pp. 128-129.) Defendant argued the prior incident was not relevant because the person he assaulted was a drug dealer, and he had acted not out of jealousy, but to help his girlfriend overcome her drug habit. (*Id.* at p. 130.) The court of appeal held the earlier assault could be relevant only if the defendant had acted out of jealousy. If he had acted with the intent of protecting his girlfriend from succumbing to her addiction, the events would not be similar enough to be probative of defendant's intent in the shooting. (*Id.* at pp. 129-132.) Because there was a factual dispute over defendant's motive in the assault, the appellate court found the trial court should have instructed the jury it could consider the assault as evidence of

defendant's intent in the shooting only if it first found defendant was motivated by jealousy in the assault. (*Ibid.*)

Even if the uncharged and charged offenses are sufficiently similar, the court must also ensure “[t]he probative value of the uncharged offense evidence [is] substantial and [is] not . . . largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury.” (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) ““Because this type of evidence can be so damaging, “[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.”” (*People v. Fuiava* (2012) 53 Cal.4th 622, 667.)

““The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.”” (*People v. Karis* (1988) 46 Cal.3d 612, 638.) The more probative the uncharged crime is to proving a material fact in the case, the less prejudicial it likely will be. Conversely, dissimilarities between the uncharged crime and the charged offense will necessarily decrease the probative value of the uncharged crime, and will increase the possibility that admission of the evidence would be prejudicial. (*People v. Balcom* (1994) 7 Cal.4th 414, 427.)



We review the trial court's decision to admit such evidence for abuse of discretion. We must uphold the ruling unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, producing a manifest miscarriage of justice. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

### 3. *Analysis*

We conclude the trial court abused its discretion by admitting evidence of the beating to prove intent because the two events were not sufficiently similar to warrant an inference appellants had the same intent.

One of the critical issues at trial and on appeal is appellants' claim their use of deadly force was justified by their belief (whether reasonable or unreasonable) that it was necessary to defend Jason from imminent threat of death or great bodily injury. "For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation.] To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Thus, the factual claims the evidence of the beating must join are (i) whether appellants subjectively believed Todd put Jason in immediate risk of great bodily injury or death warranting the use of deadly force and, if so, (ii) whether they were objectively reasonable in their beliefs. By presenting the beating evidence, the

prosecution did not seek to undercut these claims directly, but to establish generally that appellants' justification defense was a ruse, designed to distract from the evidence they killed Todd and shot at Tyler and Greg out of premeditation or malice.

But no matter how you construe the trial evidence, appellants harbored different intentions in the two incidents. The Andre beating was a coldly deliberate act to impose discipline against an associate of their own motorcycle club. According to Cody, who is the only person who testified about the event at trial, members and associates of the Brotherhood were angered by the fact Andre, who was in his twenties, was engaging in a sexual relationship with a 14- or 15-year-old girl. If that allegation was true, Andre was committing a serious crime against the child. Jason and Cody stepped in to administer punishment. But they did not act out of simple anger. They gave Andre the choice of having them turn over to police evidence of the relationship, putting him in jeopardy of criminal prosecution. Andre declined and chose instead to engage in a three-on-one fistfight. Appellants drove Andre to a secluded area of his choosing, allowed him to remove his clothes to avoid ruining them, and permitted him to throw the first punch in the fight. Though appellants administered a brutal beating—as demonstrated by the stipulation the court read to the jury describing his injuries—they did not use weapons, and they left Andre sitting up, talking, and coherent at the end of the fight. Thus, the beating of Andre was a premediated act aimed at dissuading the victim from sexually abusing a child.

The shooting was completely different. Every witness—defense and prosecution—said Todd acted as the aggressor in the events leading up to the shooting. Accounts differed only on the degree. Jason approached Tyler at the Shell station and said he remained angry about how Todd had treated Shaun at Tap Daddy’s months before. Both Tyler and Lindsay described the conversation as civil and said it ended with a handshake, and Tyler told a police investigator things were “cool” after the conversation with Jason. Nevertheless, according to all witnesses, Todd decided to hunt Jason down at a friend’s house. There, Todd confronted Jason and escalated the incident by declaring their dispute an issue involving their respective motorcycle clubs. Roughly an hour and a quarter later, Todd saw Jason and Shaun driving north on Lincoln and made a U-turn to accost them and engaged in a four-on-one fistfight with Shaun. After Cody drove up and fired two warning shots, Todd got in his truck and drove it directly at Jason. Only at that point did appellants shoot at Todd’s truck. According to Cody, he fired at the back of the truck “trying to stop Todd from killing Jason.” Whether or not Cody told the truth, the evidence shows the shooting resulted from a heated confrontation initiated by Todd and his crew against defendants, and Jason and Cody responded with deadly violence.

The only evidence Jason or Cody was involved in planning an assault on Todd came from Todd’s and Jason’s mutual friend Johnny. Johnny was present at Shaun’s house after the confrontation with Todd. Johnny reported Jason was very angry and was ranting about the fact that Todd had called the Brotherhood a pussy club. According to

Johnny, Jason was angry at Todd and said he wanted to “fuck him up.” Johnny also reported to a police investigator Jason said something like he wanted to kill Todd, but he qualified those were not Jason’s words and said at trial that was just his interpretation of Jason’s rambling. Johnny offered to reach out to Todd to try to smooth things over, but Shaun took Jason aside, calmed him down, and reassured Johnny everything would be fine. This evidence is too insubstantial to support a finding of premeditation—as the jury concluded—and indeed may have been too little to support instructing the jury on premeditation. It provides no support for concluding the uncharged Andre beating was similar to the charged shooting.

We conclude the jury could not reasonably infer from the Andre beating that appellants “probably harbor[ed] the same intent” in the shooting incident. Even interpreted against appellants, the evidence shows their intent differed in both degree of culpability and in purpose. In the beating, they acted deliberately with extreme premeditation against a non-aggressor. In the shooting, they responded in the heat of the moment to someone who was attacking them. The jury could not reasonably infer either defendant acted with malice aforethought at the shooting from the fact that they had acted with premeditation and deliberation in carrying out the beating. (See *People v. Chiu*, *supra*, 59 Cal.4th at p. 166 [noting premeditation, as distinguished from malice aforethought, “is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death”].)

Moreover, the purpose of the beating was to discipline someone associated with their motorcycle club for criminal conduct against a child. The purpose of the shooting was to respond (whether with justification or not) to aggression on the part of an associate of a rival motorcycle club who had just escalated an earlier disagreement in a threatening manner. These differences in intent show this case is like *Simon, supra*, 184 Cal.App.3d at p. 130, where the court of appeal determined the trial court should not have permitted evidence defendant pulled a gun on a man in his girlfriend's house to show intent if his purpose was not the same as his purpose in the charged incident—shooting a man in his ex-girlfriend's house out of jealousy.<sup>19</sup> We agree with the *Simon* court that a trial court should not permit the jury to hear about such a dissimilar earlier offense to establish intent.

The trial court based its contrary conclusion on two facts—that appellants acted with two other people in both incidents, and both victims were members or hang-arounds of motorcycle clubs with attendant allegiances. These similarities are shallow. Not just any similarity will suffice to warrant admission under section 1101(b). (*Ewoldt, supra*, 7 Cal.4th at p. 402.) And the similarities the trial court relied on provide little to no support for the conclusion appellants had the same intent in engaging in the charged offenses as they had in engaging in the uncharged offense.

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<sup>19</sup> The *Simon* court did not hold evidence of the prior offense should have been excluded outright because there was a factual dispute concerning appellant's purpose in carrying out the uncharged offense. Here the purpose of the uncharged beating is undisputed.

On the contrary, the dissimilarities between the beating of Andre and the shooting of Todd predominate. The beating was essentially a matter internal to the Brotherhood, did not involve rivalries between clubs, and did not involve the intent to kill. Andre was given a choice of subjecting his freedom to the jeopardy of criminal prosecution or subjecting his physical well-being to the jeopardy of engaging in the wrong end of a three-on-one fight. The shooting was the result of animosity between members of the Brotherhood and Vagos motorcycle clubs, arose from rapidly escalating confrontations, and ended in homicide.

We therefore conclude the beating and the shooting did not share the “least degree of similarity” needed for admission under section 1101(b) to prove intent. (*Ewoldt, supra*, 7 Cal.4th at p. 402.)

We also conclude the prejudicial impact of admitting the evidence of the beating substantially outweighed its negligible probative value. The pronounced dissimilarities between the beating and the shooting increased the likelihood its admission would be prejudicial. The People argue the evidence of Andre’s beating was not prejudicial under section 352 and could not have evoked emotional bias on the part of the jury because the evidence leading up to the beating was “mild in comparison” to the facts of the shooting. We are not persuaded.

The beating was in many ways *more* disturbing than the shooting precisely because it was so deliberate, so personal, and so brutal. The jury heard evidence Cody and Jason executed a plan to isolate and beat a friend with their bare hands. They drove

him to a remote area, allowed him to prepare himself, and then savagely attacked him, breaking his nasal bone, jaw bone, and an orbital bone under one eye and inflicting lacerations to his face and scalp which were serious enough doctors treated them with staples. The potential for prejudice was greater because appellants were not prosecuted for the beating, tempting the jury to convict them of the charged offenses to assure punishment for the uncharged offenses. (*People v. Balcom, supra*, 7 Cal.4th at p. 427.) We conclude this evidence of callous disregard for human suffering is extremely inflammatory and should have been excluded on prejudice grounds, especially in view of its limited probative value.

Courts must be especially careful in admitting evidence of uncharged offenses under section 1101(b) because of the threat the jury will use it as improper propensity evidence. (See *People v. Lewis* (2001) 25 Cal.4th 610, 637 [“[E]vidence of uncharged offenses ““is so prejudicial that its admission requires extremely careful analysis””” under section 352], quoting *Ewoldt, supra*, 7 Cal.4th at p. 404.) The trial court’s ruling in this case demonstrates why it is so important to exercise care in these circumstances. After noting the key issue for the jury would be to evaluate appellants’ justification defenses, the court concluded the jury should hear the evidence about the beating because it was “important for them to understand that *these two defendants . . . have the capability*, if you will, *to act pursuant to a specified intent*, and it is relevant.” (Italics added.) This ruling is misguided. Even if the evidence had been admissible for some purpose, it was not admissible to show appellants had the *capacity* to act violently with malice

aforethought. That is precisely what section 1101(a) bars. As we will discuss in part II.D., *post*, the prosecution made the same error in its closing argument.

The People contend we should uphold the trial court on the alternative ground the beating evidence was admissible under section 1101, subdivision (c) to attack Cody's credibility. We disagree. Even assuming the prior incident was relevant to Cody's credibility as an incident showing moral turpitude, for the reasons we discuss above, we conclude the trial court abused its discretion by failing to exclude the evidence as unduly prejudicial. (*People v. Beagle* (1972) 6 Cal.3d 441, 453-454, abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1191-1192.)

### ***B. The Exclusion of Todd's Road-Rage Incident***

Appellants contend the trial court abused its discretion by excluding evidence Todd previously tried to run a Brotherhood motorcyclist and his passenger off the road with his truck shortly after his confrontation with Shaun at Tap Daddy's. Appellants sought to introduce this evidence to bolster their claims of self-defense and defense of another, and contend the evidence was admissible under section 1101(b) and Evidence Code section 1103, subdivision (a)(1) (section 1103(a)). We agree.

#### ***1. Additional background***

Cody's attorney argued the road-rage evidence was admissible under section 1101(b) to prove common plan or scheme, absence of mistake, motive, and intent. Jason's attorney argued the evidence would prove how Todd reacted to seeing someone wearing Brotherhood colors. The prosecutor expressed skepticism whether evidence of a



victim's uncharged misconduct is admissible under section 1101(b), and suggested the evidence was best analyzed under section 1103(a). However, attorneys for both appellants initially disclaimed any intention to introduce the evidence under section 1103(a), to avoid "opening the door" to evidence of appellants' character such as the beating of Andre under section 1103, subdivision (b) (section 1103(b)).<sup>20</sup>

Cody's attorney argued the road-rage incident and the events leading up to the shooting were nearly identical. In both instances, Todd used his truck to force off the road a motorcyclist who was a member of the Brotherhood. In the prior incident, the victims were the owner of Tap Daddy's and her fiancé. In the charged incident, Shaun said he was the victim of a similar assault which escalated. Appellants' attorneys argued the evidence was admissible to prove absence of mistake—that Todd did not accidentally swerve in front of Shaun—and to prove motive—that Todd swerved in front of Shaun with the intent to assault and exact revenge on a member of the Brotherhood for the Tap Daddy's incident. The prosecutor again argued the evidence was not admissible under sections 1101(b) or 1103(a) and should be excluded under section 352.

The court tentatively ruled the evidence was inadmissible because it had very little probative value and because the road-rage incident could not be independently verified, and was therefore unreliable and should be excluded under section 352.

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<sup>20</sup> Section 1103(b) permits evidence of a criminal defendant's character for violence in the form of evidence of specific instances of conduct to prove conduct in conformity if "evidence that the *victim* had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)." (*Italics added.*)

However, the court deferred a final ruling until the prosecution's evidence was more fully developed.

Near the end of the People's case-in-chief, Cody's attorney requested to be heard again on the admissibility of the road-rage evidence. Counsel argued the evidence was admissible under section 1103(a) to evaluate Todd's conduct even if the appellants were unaware of the road-rage incident. The court noted the evidence might be admissible to prove Cody's state of mind if he was aware of the road-rage incident. Defense counsel said Cody did not know about the incident at the time of the shooting, but that Shaun did. Shaun's attorney argued his client would testify he was aware of Todd's propensity for violence, but the court noted Shaun's state of mind at the time of the shooting was irrelevant to the sole charge against him of being an accessory after the fact. Jason's attorney argued the road-rage incident was relevant under section 1103(a) to prove the appellants' actions on the night of the shooting were reasonable, and not to prove their state of mind.

The trial court ruled the evidence was not admissible under section 1103(a) because proving Shaun's state of mind was irrelevant, and the evidence was excluded under section 352 because its probative value was substantially outweighed by its prejudicial impact.

## *2. Legal principles*

As we have discussed, section 1101(b) is an exception to the general prohibition on admission of character evidence, and provides uncharged misconduct is admissible

when relevant to establish some fact other than the person's disposition to commit such an act. By its plain terms, section 1101 applies to character evidence regarding any "person," not just criminal defendants. (§ 1101, subds. (a), (b).) The uncharged misconduct must be material to the fact in dispute and have the tendency to prove that fact. (*People v. Lindberg* (2008) 45 Cal.4th 1, 22.)

Section 1103(a) creates another exception to the general prohibition on admission of character evidence when a *defendant* offers evidence regarding the character or trait of a *victim*. A defendant can offer evidence of specific instances of the victim's conduct precisely "to prove conduct of the victim in conformity with the character or trait of character." (§ 1103, subd. (a)(1).) Indeed, "[i]t has long been recognized that where" as here "self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible." [Citations.] Under Evidence Code section 1103, such character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence." (*People v. Wright* (1985) 39 Cal.3d 576, 587.) Thus, under section 1103(a), appellants could have presented evidence of the prior incident of road rage to show not only Todd's motive, but also to establish his propensity for violence and that he acted in conformity with his prior act when he assaulted Shaun.

As is true generally, the trial court may exclude such probative evidence if allowing it would have confused the issues at trial, consumed too much time, or been more prejudicial than probative. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828

(*Gutierrez*).) We review a decision to exclude such evidence for abuse of discretion.

(*Id.* at p. 827.)

### 3. *Analysis*

We conclude the road-rage evidence was admissible under both section 1101(b) and section 1103(a).<sup>21</sup>

The road-rage evidence is probative of the claim appellants used deadly force only in response to Todd's use of deadly force against Jason. The fact that Todd used his truck to force a member of the Brotherhood from the road supports the testimony by Cody and Shaun that Todd used his truck to force Shaun off the road before assaulting Shaun. Tyler and Greg put that issue in dispute by their testimony that Todd simply pulled up next to Shaun at the stop sign. If believed, the fact Todd acted aggressively on the first occasion lends credence to the testimony Todd was the aggressor throughout the encounter on August 29, 2010, and undermines the prosecution theory appellants were themselves the aggressors. It also shows Todd's motive and intent (§ 1101(b)) and his capacity for violence and for action in conformity with the prior act (§ 1103(a)). Had the

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<sup>21</sup> The People contend appellants forfeited their argument the road-rage evidence was admissible under section 1101(b) by failing to raise the issue again after the trial court initially refused to allow the evidence. However, appellants fully articulated the substance, purpose, and relevance of the excluded evidence in the trial court and obtained a detailed ruling. (Evid. Code, § 353, subd. (a).) This case is not like the authorities the People cite, where the appellant raised an argument on appeal never raised in the trial court (*People v. Holloway* (2004) 33 Cal.4th 96, 133), failed to alert the trial court its ruling did not address the substance of a motion (*People v. Rodgers* (1976) 54 Cal.App.3d 508, 516-517), or ignored a specific directive from the trial court to make an offer of proof and obtain a ruling later (*People v. Anderson* (2001) 25 Cal.4th 543, 581).

jury heard the evidence, it would have been more likely to find Todd was the aggressor and used the truck to force Shaun off the road. Those conclusions would have made it more likely the jury would have concluded Cody and Shaun reasonably believed Todd meant to use the truck as a weapon when he turned it at Jason—a critical factual point for appellants’ justification defenses.<sup>22</sup>

Unlike the evidence of Andre’s beating, there were many relevant similarities between the road-rage incident and the events leading up to the shooting of Todd. Assuming for purposes of this discussion the truth of Shaun’s and Cody’s testimony and the inferences to be drawn from the evidence as a whole, the record shows Todd tried to run Shaun off the road with his truck out of animosity toward members of the Brotherhood. The owner of Tap Daddy’s testified Todd had previously used his truck to run her fiancé’s motorcycle off the road because of the same animosity toward members of the Brotherhood. It is also notable the first offense occurred very near Shaun’s house, suggesting Todd acted out of animosity for Shaun, not just the Brotherhood. This satisfies the “least degree of similarity” to admit the evidence to prove Todd’s motivation or intent when he drove his truck toward Jason. (*Ewoldt, supra*, 7 Cal.4th at p. 402.) The similarities of the earlier assault also warrant admission to show Todd acted in conformity on August 29, 2010.

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<sup>22</sup> The dissent concludes the road-rage incident was not probative because Cody and Jason did not know about it. In our view, the dissent ignores the true relevance of the evidence.

The trial court also abused its discretion in finding the prejudicial impact of introducing evidence of the prior act of road rage substantially outweighed its probative value. The trial court based its ruling on its erroneous conclusion the evidence had no probative value at all unless Cody and Jason were aware of the incident. As we have discussed, the evidence in fact had substantial probative value concerning issues other than Cody's and Jason's states of mind. We see little reason to conclude the prior offense was prejudicial. Todd's act was not an extreme act, did not escalate to violence as did his encounter with Shaun, no one was injured, and the incident did not have any other markers of being inflammatory, nor would introducing the evidence have consumed a great deal of time. The parties obtained thorough and concise testimony about the incident at the Evidence Code section 402 hearing. Indeed, the testimony was quite short—covering fewer than 20 transcript pages—considering it included direct examination, cross-examination by two attorneys, redirect examination, recross-examination, and further redirect examination. The trial court obviously could have limited the testimony even more at trial.

***C. Instructing the Jury on Provocation***

Appellants contend the trial court erred by instructing the jury they had no right of self-defense or defense of another if they provoked the quarrel. We agree.

***1. Additional background***

The trial court instructed the jury “[a] person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use

force.” (CALCRIM No. 3472.) Appellants contend this instruction was improper because the prosecution presented no evidence any of the defendants acted to provoke the confrontation with Todd, Tyler, Greg, and Karl.

## 2. *Legal Principles*

“‘[T]he trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.’” (*People v. Smith* (2013) 57 Cal.4th 232, 239.) Consequently, “[i]t is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; see also *People v. Perez* (2005) 35 Cal.4th 1219, 1226-1227.)

We look to the evidence before the jury to determine whether it supports giving the instruction. (*People v. York* (1992) 11 Cal.App.4th 1506, 1511.) “Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.” (*People v. Flannel* (1979) 25 Cal.3d 668, 685, superseded by statute on other grounds as stated in *People v. Elmore* (2014) 59 Cal.4th 121, 130.) If the evidence supporting a disputed point is “minimal and insubstantial,” the instruction is inappropriate. (*Id.* at p. 684; *People v. Lee* (2005) 131 Cal.App.4th 1413, 1426.)

The question whether a particular instruction is appropriate is a mixed question of law and fact, but is predominantly legal, so we exercise independent review. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

### 3. *Analysis*

Appellants say the trial court erred by instructing the jury they were not entitled to their justification defenses if it concludes they provoked the quarrel. The People argue there was no error because the record contains substantial evidence appellants did provoke the quarrel.<sup>23</sup> We agree with appellants.

As already stated *ante*, the prosecution's own witnesses testified Todd made a U-turn and pursued the motorcyclists. Further, every witness testified either Todd or Tyler got out of their truck and attacked Shaun. This evidence seriously undermined the prosecution theory appellants pursued Todd and provoked the quarrel. Indeed, the prosecution did not present other significant evidence to support that theory. Instead, it focused on evidence Jason was angry and in a rage in a conversation with Shaun after the confrontation at Psycho's. But the evidence shows Shaun took Jason aside, calmed him down, and convinced him to go to Psycho's in the service of fixing the problem. Both Cody and Shaun gave consistent and detailed testimony that Shaun and Jason were riding to Psycho's house to gather information about the dispute. There is no evidence any

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<sup>23</sup> The People concede we may review appellants' claim of instructional error even though they failed to timely object because it affects their substantial rights. (Pen. Code, § 1259; *People v. Johnson* (2016) 62 Cal.4th 600, 639.)



defendant said anything about accosting Todd or even that they were looking for Todd when *he* accosted *them* at the corner of Lincoln and Palm.

We conclude the jury heard no evidence Jason or Cody provoked the fight, and instructing the jury that such provocation vitiated their justification defenses was improper.

#### ***D. Prejudice***

To reiterate, we find the trial court: (i) abused its discretion by admitting evidence appellants participated in an unrelated beating of a fellow associate of the Brotherhood motorcycle club as a form of discipline; (ii) abused its discretion by excluding evidence the victim had previously assaulted two other associates of the Brotherhood using his truck in precisely the manner appellants claimed the victim assaulted them; and (iii) erred by instructing the jury appellants could not avail themselves of their justification defenses if they provoked the violent incident. All of these errors were relevant, either directly or indirectly, to Cody's defense that he acted to defend Jason and Jason's defense that he acted to defend himself. They are also relevant to Jason's claim he acted in the heat of passion when he shot Todd.<sup>24</sup> We must now determine whether the errors prejudiced either or both appellants.

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<sup>24</sup> Cody too claimed he acted in the heat of passion. However, the jury verdict finding him guilty of voluntary manslaughter is consistent with that defense. As a result, even if the jury did not find he acted in the heat of passion and it is reasonably probable it would have done so absent the trial court's errors, there would be no prejudice; he would have received the same result absent the errors.

We may reverse a judgment only if we conclude the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *People v. Richardson* (2008) 43 Cal.4th 959, 1001.) Evidentiary errors and errors of instruction on inapplicable legal theories are harmless unless it is reasonably probable the appellants would have received a more favorable result absent the error or errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 [evidentiary error]; *People v. Debose* (2014) 59 Cal.4th 177, 205-206 [instructional error].) We will find a more favorable result reasonably probable if the errors, individually or together, undermine our confidence in the outcome. (*In re Hardy* (2007) 41 Cal.4th 977, 1036.)

We need not determine prejudice separately for each error because multiple errors, taken together, may have a cumulative prejudicial effect. (*People v. Hill* (1998) 17 Cal.4th 800, 844, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [“[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error”].) Here, all the errors we have identified undermined appellants’ justification and heat of passion defenses. We conclude the introduction of the evidence of the uncharged beating prejudiced Cody by undermining his perfect defense-of-another defense, and the exclusion of evidence of Todd’s prior road-rage incident amplified the prejudice. There is a reasonable probability the jury would have acquitted him absent the errors.

As for Jason, we conclude the three errors undermine our confidence in the attempted murder and second degree murder verdicts. We conclude the errors prejudiced

Jason by undermining his claim of self-defense as it relates to the attempted murder convictions, but do not undermine confidence in the second degree murder and firing into an occupied vehicle verdicts in the same way they did for Cody, because there is compelling evidence Jason continued to shoot and committed the homicide after the threat to his safety had ended. However, we conclude the errors did prejudice Jason by undermining his heat of passion defense. There is a reasonable probability the jury would have found him guilty of voluntary manslaughter absent the errors. Because the heat of passion defense does not affect the shooting into a vehicle conviction, we find no prejudice as to that verdict.

Because the effects of the errors on appellants differ, we discuss them separately.

1. *Cody's convictions*

In closing argument, Cody's attorney identified his justification defense as "the heart of the case." She continued, "The question, ladies and gentlemen, you have to determine is whether or not my client acted in defense of others . . . [¶] There are certain elements you're going to have to find. One is going to be whether my client had an actual and reasonable belief in the need to act in the defense of others. If you find that, in fact, to be true . . . it's a defense to count 1, which is murder . . . and a defense to count 4, shooting at an occupied vehicle. It's also a . . . complete defense to all of the lesser included [offenses], [including] voluntary manslaughter."

Murder is the unlawful killing of a human being with malice aforethought, whether express or implied. (*People v. Lasko* (2000) 23 Cal.4th 101, 107; Pen. Code,

§ 187, subd. (a).) Express malice—also called intent to kill—requires showing the defendant either desired the death of the victim or knew to a substantial degree of certainty that death would occur. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Implied malice requires a showing the defendant consciously disregarded human life. (*People v. Lasko*, at p. 107.) A homicide is murder of the first degree if it is done in a willful, deliberate, and premeditated manner; all other murders are of the second degree.<sup>25</sup> (Pen. Code, § 189.)

Manslaughter is the unlawful killing of a human being without malice. (Pen. Code, § 192.) A killing is voluntary manslaughter when the defendant intentionally kills based on an *unreasonable* but good faith belief in the need to act in self-defense or defense of another, or when the defendant intentionally kills while in a sudden quarrel or heat of passion. (*People v. Blakeley* (2000) 23 Cal.4th 82, 88 [imperfect self-defense]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 829 [imperfect defense of another]; *People v. Lasko*, *supra*, 23 Cal.4th at pp. 107-108 [sudden quarrel or heat of passion].) As Cody’s attorney argued, reasonable defense of another is a complete defense.

Consistent with these principles, the trial court instructed the jury appellants were not guilty of murder, manslaughter, attempted murder, attempted voluntary manslaughter, or discharging a firearm into an occupied motor vehicle if they acted in complete (or

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<sup>25</sup> Penal Code section 189 also designates killings committed using certain defined means or while perpetrating certain specified non-homicide offenses as first degree murder and also designates certain kinds of murder as willful, deliberate, and premeditated per se.

perfect) self-defense or defense of another. (CALCRIM Nos. 505, 571, 3470.) The trial court also instructed the jury a killing is reduced to voluntary manslaughter if they acted in imperfect self-defense or defense of another. (CALCRIM No. 571.) The trial court explained it should find a perfect (exculpatory) justification defense if appellants were reasonable in their belief in the need to use deadly force, but an imperfect (culpability reducing) justification defense if they were unreasonable in that belief. (CALCRIM No. 571.) Finally, the court instructed the jury “[t]he right to use force in self-defense or [in] defense of another continues only as long as the danger exists or reasonably appears to exist,” and the right to use force ends “[w]hen the attacker withdraws or no longer appears capable of inflicting any injury.” (CALCRIM No. 3474.)

The jury found Cody guilty of voluntary manslaughter, not murder. This verdict is consistent with the jury having found Cody acted in defense of Jason, but finding he was unreasonable in believing Jason faced an imminent threat of death or great bodily injury that justified shooting in response. (*People v. Humphrey, supra*, 13 Cal.4th at p. 1082.) It is also consistent with the jury having found Cody did not act in defense of Jason, but did act in the heat of passion. (§ 192, subd. (a); *People v. Elmore, supra*, 59 Cal.4th at p. 133.) To determine whether the trial court’s errors prejudiced Cody, then, we must determine the likelihood, absent the errors, that the jury would have found (1) he actually believed Jason faced imminent danger and (2) his belief was reasonable. If the likelihood is high enough to undermine our confidence in the verdict, we must reverse the convictions. (*In re Hardy, supra*, 41 Cal.4th at p. 1036.)

Cody and Shaun gave consistent, detailed testimony they and Jason were going about their own business when Todd attacked them. Other witnesses corroborated their accounts or provided supporting details. According to all witnesses, Todd accosted Jason at Psycho's house and declared their dispute a "club issue," which at minimum raised the threat the dispute would erupt into violence. Cody and Shaun said Jason called them soon after the confrontation to ask for their help. They said they met with Jason at Shaun's house and then proceeded to Psycho's house. Shaun explained, as sergeant at arms of the Brotherhood, he wanted to talk to Psycho because he was responsible for finding out what had happened. Both described their trip to Psycho's and how Todd and his cohort interrupted it only a few blocks from Psycho's house. According to Shaun, Todd used his truck to force his motorcycle to the side of the road before cutting him off and stopping him at the intersection of Lincoln and Palm. Shaun said Todd, Tyler, and other passengers got out of the truck, hit him to force him off his motorcycle, and then continued to fight him until Cody pulled up and fired a couple of warning shots. Cody described events similarly.

Cody also gave consistent, detailed testimony about what happened when Todd got into his truck after the warning shots. He said Todd got in his truck and started to drive away. Though the truck was pointed northeast on Palm and he could have driven in that direction, he instead turned to go north on Lincoln. Cody said the truck's tires squealed and the truck went "straight at [Jason]." "As the truck came straight at him, [Jason] pulled his firearm and fired at the front of the truck." Cody said Jason "started

firing into the truck as it was coming at him,” and “I fired four more shots into the back of the vehicle. And then the vehicle started to turn left.” Cody said he fired the four shots “trying to stop Todd from killing Jason” and he stopped firing when Todd turned left.

No other witness testified about these details. However, the physical evidence corroborates some details of Cody’s testimony. Police found five shell casings that could have come from Cody’s gun near his location during the shooting. Cody, who admitted firing six shots, volunteered a sixth casing fell onto the Suburban. Police found 17 shell casings from another gun or guns located near Jason’s position. And a video surveillance camera recorded the sounds of the gunshots—two initial shots (consistent with Cody’s warning shot testimony), followed by a barrage of additional shots over 11 seconds, and then a single final shot 14 seconds later.

Cody and Shaun also explained why all three defendants went into the altercation concerned about violence. As we have mentioned, all witnesses said Todd was the aggressor in this affair, accosting Jason at a friend’s house, insulting him, and declaring their (minor) dispute a club issue. Lindsay, Cody, and Shaun all said Jason was upset and worried after the encounter. Cody said he was concerned for his own safety and armed himself because Jason told him Todd was a Vagos member. Cody said at the time he believed, based on news accounts and reports he heard from personal acquaintances, the Vagos had engaged in shockingly violent attacks on law enforcement. Cody also said Psycho was uneasy when he delivered a gun for his protection. In addition, Shaun and

the president of the Brotherhood testified that by declaring the dispute a club issue Todd had increased the risk of violent conflict between members of the different motorcycle clubs. Finally, Cody said he recognized Todd's truck from Psycho's description and then saw Todd swerve his truck in front of Shaun and cut him off. At the time, he believed the vehicles collided. If one credited Cody's account, it would be reasonable to infer Jason saw Todd use his truck to cut Shaun off and Jason would not have been able to see whether there was a collision or how Shaun fared.

All of this background provided a sound evidentiary basis for the jury to conclude Cody and Jason reasonably believed Todd intended to use his truck to hit Jason when he turned it to drive directly at him. Evidence of the beating of Andre constituted a frontal attack on the reasonableness of their appraisal and response to Todd's act. Nothing makes that fact clearer than the use to which the prosecution put the evidence in closing arguments. The prosecutor explained they put on the evidence about the Andre beating "because that tells us *how these guys deal with problems* – how Mr. Schlig and Mr. Young – how they deal with someone whose behavior has offended them. They hurt them. They gang up on them. They team up on them, multiple people on one person hurting that person. That's *how they deal with problems* that they don't like." (Italics added.) "We can tell how these people involved in this case deal with their problems: Violence, injury, broken bones, disparate numbers, death, or yelling and punching." As these quotations show, the prosecutor used the evidence of the Andre beating to show Cody and Jason had the *propensity* to resolve disagreements through violence.



The prosecutor then explicitly drew a connection to appellants' claim they had acted reasonably to defend Jason from Todd. The prosecutor asked, how "do we know this isn't a case of lawful self-defense? Andre . . . You are allowed to use this incident to consider what the intent was in these defendants' mind when they pulled the triggers of their guns time after time after time." The prosecutor argued the beating shows "Todd Brown's murder was not an accident. It was not unexpected. It was not self-defense. It was an opportunity. It was an opportunity for Jason Schlig to kill the man who pissed him off and belittled him and called him names and said, 'I'll be driving your bike.' And Cody Young helped him out. Cody Young—who goes everywhere, does everything with Jason Schlig – 'I'm there. Hey, I've got a gun, too. I'll help you out.' [¶] This was the reality. This was the taking advantage of an opportunity to kill. Here's Todd Brown. Here he is, a sitting duck in his truck. Fire away. Because he had done us wrong. And this is *what we do* to people who have done us wrong." (Italics added.)

Other than the evidence of the beating, there was very little to draw Cody's and Shaun's testimony into doubt. Tyler and Greg said Todd did not cut Shaun off with his truck, but merely drove up next to him before getting out and starting a fistfight. But, to put it charitably, Tyler and Greg's testimony lacked many of the standard indicia of trustworthiness. (See Evid. Code, § 780 [failings of memory, personal interest in outcome, past inconsistent statements, other evidence disproving testimony, admissions of untruthfulness all support finding witness testified untruthfully]; see also CALCRIM No. 226, Witnesses [same].) Even on the incident at Tap Daddy's, Tyler's testimony was

contradicted at every turn. Tyler said he went to the bar to see the cover band and said he watched the band with Greg from the VIP area. Greg said he went to the bar to meet up with an ex-girlfriend, went to the VIP area alone to find her, and did not have a chance to watch the band because Shaun asked him to leave within a couple minutes of arriving. The two disagreed about the details of the fight as well. Tyler said the fight began when Shaun took a swing at him. The rest of the fight included Todd punching Shaun, a third person putting Todd in a headlock, and Tyler punching the third man. After that, according to Tyler, everything got quiet and they left. Greg said Todd threw the first punch, which resulted in chaos, with Todd and Tyler fighting a bunch of people. Shaun and the owner of Tap Daddy's contradicted details of both accounts. They said Todd threw the first punch, the fight ended immediately, and Shaun acted to defuse the fight throughout.

As for Tyler's testimony about the day of the shooting, his prior statements to police and at the preliminary hearing were inconsistent on several important points. A few examples will suffice to show the problem. Tyler told police Greg was not with him at the shooting, but at trial, he admitted this was a lie. First, he said he lied because Greg had a new job and asked Tyler not to bring him into it. But when reminded he later told police he had lied to protect Greg's life, he changed his story again and reverted to that explanation. Tyler also told police he got out of the truck and hit Shaun after Shaun got off his motorcycle and opened Tyler's door. But at trial, he said Shaun only reached for the door from his motorcycle, and his father got out of the truck and hit Jason. Tyler told

police he didn't see Jason after he went through the intersection and did not see where the gunshots came from and did not see anyone with a firearm. But at trial he said he saw Jason shooting. It is telling all these changes in Tyler's account, if believed, tend to increase the defendants' culpability.

Tyler's timeline of events was also inconsistent with the surveillance video from a nearby building. Tyler said they waited three or four hours after the conversation at the Shell station before Todd returned from work and waited longer after he returned before leaving for Psycho's house. The video establishes Todd returned home only 13 minutes after Tyler and Karl returned from the Shell station and Todd's truck left again about five minutes later.

The rest of Cody's and Shaun's accounts stand unchallenged. All the witnesses admitted Todd accosted Jason after what appeared to be an innocuous encounter between Jason and Tyler at the Shell station. All said Todd declared their dispute a "club issue." No one disputed this declaration increased the risk of violence, or that Jason and Cody were worried about that danger. Everyone admitted Todd made a U-turn and pursued Jason and Shaun and that either Todd or Tyler started the physical fight. No one contradicted Cody's testimony his first shots were warning shots. None of the other witnesses could say whether Todd drove his truck directly at Jason, as Cody testified. Nor did anyone contradict Cody's testimony that he stopped shooting when Todd turned his truck away from Jason.

We conclude from all these facts the trial court's erroneous decision to admit evidence Cody and Jason participated in the brutal beating of Andre prejudiced Cody. The evidence was strong that Jason and Cody reasonably believed Todd intended to use his truck to strike Jason. The jury could find Todd used the truck as a dangerous weapon when he drove it at Jason. (*People v. Russell* (2005) 129 Cal.App.4th 776, 782 ["The law makes clear a person who operates or drives a vehicle in an attempt to injure another person has committed assault with a deadly weapon, to wit, the car"].) The limited evidence Cody and Jason did not reasonably believe Jason to be in serious danger—primarily Tyler's testimony—included strong indicators of untrustworthiness. (Evid. Code, § 780.) The strongest evidence against appellants' justification defense was the beating evidence. The prosecutor appeared to recognize that fact, since he relied on it heavily in closing arguments and used it improperly in an effort to convince the jury Cody and Jason responded with deadly force, not because it was justified, but because it was in their nature to do so. At the end of the analysis, our confidence in the outcome is shaken. It is at least reasonably likely the jury would have concluded Cody reasonably believed Jason was in imminent danger of death or great bodily injury and responded appropriately.

The trial court's exclusion of the road-rage incident amplified the prejudice to Cody. The decision deprived the jury of important corroboration for Cody's and Shaun's testimony that Todd used his truck to force Shaun off the road. If the jury credited that testimony, it would have been more likely to conclude Cody and Jason were reasonable

in believing Todd intended to turn his truck into a weapon against Jason. The road-rage evidence shows Todd's propensity to use his truck as a weapon and may have led the jury to accept Todd used his truck to run Shaun off the road. Accepting their story on that point would have led the jury to conclude Jason and Cody watched Todd use his truck as a weapon against Shaun, making it more likely the jury would conclude both that they believed Todd meant to use the truck as a weapon against Jason and that they were reasonable to do so.

As for instructing the jury appellants could not claim justification for their actions if they had provoked the fight, we conclude Cody was not prejudiced by the error. A finding that Cody provoked the incident would have precluded the jury from deciding Cody acted unreasonably in defense of Jason or acted in the heat of passion. The jury's voluntary manslaughter verdict makes clear it made one of those findings. Thus, though the court improperly put its thumb on the scale in favor of finding Cody provoked the incident, we must conclude the error did not cause Cody to receive a less favorable verdict than he otherwise would have received.

## *2. Jason's Convictions*

### *a. Prejudice to self-defense claims*

The same reasons for concluding the trial court's errors prejudiced Cody's ability to convince the jury of his defense of others claims apply to Jason's ability to convince the jury he acted in self-defense, at least when he began shooting.

Unlike with Cody, for Jason, the trial court's erroneous provocation instruction did amplify the effect of the other errors. The jury evidently did not accept that Jason acted in the heat of passion or in imperfect self-defense. Consequently, the suggestion Jason could not avail himself of those defenses if the jury concluded he provoked the attack means the instruction potentially misled the jury. As we noted for Cody, the prosecution put on no evidence either defendant acted to provoke the attack. The only possible evidence of such provocation would be that Jason was angry about the Tap Daddy's incident and the confrontation at Psycho's. But Jason's anger shows, at most, motive, not any effort to provoke a quarrel.

We conclude we must reverse Jason's attempted murder convictions because, absent the beating evidence and the provocation instruction and with the evidence of Todd's prior road-rage incident, there is a substantial likelihood the jury would have found Jason acted in self-defense when he fired in the vicinity of Tyler and Greg and the shots that traveled near them were errant—meant for Todd, not Tyler and Greg.

As for the convictions for killing Todd and shooting into his vehicle, there is one critical factual difference between Cody's case and Jason's. Cody said—without contradiction—he stopped shooting at Todd when Todd turned his truck away from Jason. This fact is what makes it necessary to reverse Cody's convictions for voluntary manslaughter and discharging a firearm into an occupied vehicle. In Jason's case, however, compelling evidence supports the conclusion Jason continued shooting after the threat against him had ended. That factual difference compels us to conclude it was not

the trial court's errors that harmed his ability to make out a justification defense in relation to the killing of Todd.

i. *Attempted murder convictions*

We need not repeat in detail the reasons we conclude there is a substantial likelihood absent the trial court's errors the jury would have reached a more favorable result for Jason on his attempted murder convictions—enough to undermine our confidence in the verdicts. In the main, they are the same.

If the jury had not heard evidence of Jason's propensity for violence, but had heard evidence of Todd's propensity for violence, it would have been substantially more likely to find Jason believed (reasonably or not) Todd meant to hit him with his truck and the gunshots Tyler and Greg thought were meant for them were aimed at Todd. That finding would have compelled the jury to acquit Jason on the attempted murder charges because attempted murder requires proof the accused intended to kill the alleged victims, not someone else. (*People v. Bland, supra*, 28 Cal.4th at p. 328.) Absent the problematic propensity evidence, there was very little evidence Jason had the intent to kill either Tyler or Greg.

Tyler's testimony was vague and contradictory. Initially, he said he did not see Jason shooting. On cross-examination, he changed his story and said he saw Jason with a gun and saw him firing it. He did not testify, however, that he saw Jason firing the gun at him. Instead, he testified he felt "[g]un blasts on the side of my legs, rocks, whatever it's called" as he ran away on a gravel driveway. He explained he thought "like there was

bullet fragments hitting the ground or whether bullets hitting the ground and shooting up rocks or—I don’t know what it was that was coming up. I know he was shooting.”

Greg’s testimony was only marginally better. He said Jason shot at him as he ran past the house located on the southeast corner of the intersection. “[T]he first house on the corner had a mailbox. And I hit gravel out front. [¶] And I remember the shooter—when I was running, I looked over—and I remember him pointing his gun at me, and he just kept firing at that point. [¶] And I remember gravel—I’m not sure if it was gravel or the mailbox fragments—hitting me in the face when I was running.”

This testimony is not compelling evidence Jason intended to shoot at Tyler or Greg, especially in view of the now familiar problems with their testimony. At best, their testimony is vague and inconclusive. It is consistent with their having been caught in crossfire. It is also consistent with their having been simply frightened as they ran past as Jason was shooting at Todd’s truck. But more important for our purposes, the physical evidence does not bear out their claim Jason turned from Todd to shoot at them.

The officers who processed the crime scene found evidence of only a single bullet in the vicinity of the path Tyler and Greg took as they fled the scene of the fight. That bullet struck the north face of the home on the southeast corner of the intersection, within the path of bullets traveling from where Jason stood to where Todd’s truck was located—crediting Cody’s account—as it first turned toward Jason. Thus the physical evidence does not support finding Jason fired specifically in Tyler’s and Greg’s direction as they fled. We conclude the evidence on this point is essentially in equipoise, which is enough



to undermine our confidence in the jury's verdicts that Jason attempted to kill Tyler and Greg.<sup>26</sup>

ii. *Second degree murder and shooting into a vehicle convictions*

The right to use force in self-defense ends when the attacker withdraws or no longer appears capable of inflicting any injury. (*People v. Martin* (1980) 101 Cal.App.3d 1000, 1010.) Thus, while there is reason to believe, absent the trial court errors, the jury would have concluded Jason reasonably believed he needed to use deadly force to defend himself up to the point the danger ended, there is compelling evidence Jason continued shooting at Todd—and in fact killed him—*after* the danger was over.

Karl testified he saw Jason firing at Todd as Todd drove away down Palm and into a field. Cody's testimony on this point was less clear. He said Jason was still firing when Todd turned left and described him as stopping "just [as the truck] left the intersection" headed west "down Palm." Later, Cody said he thought Jason stopped firing after Todd had turned left, fish-tailed the truck, and just as Todd finished backing up a little to prepare to go forward. Assuming Cody's testimony is clear enough to create a conflict on the point with Karl, however, other evidence resolves the conflict decisively against Jason.

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<sup>26</sup> Though the dissent disagrees with our prejudice analysis generally, it does not discuss the evidence related to the attempted murder charges, and so leaves unexplained why it disagrees with our conclusion the trial court's errors prejudiced Jason's defense of those charges.

The physical evidence gave the jury a strong basis for finding Jason continued to shoot after the risk of danger had ended. We know Todd's truck drove out of the intersection and curved first to the eastbound lane of Palm before curving back to the right and then going off the road about 172 feet down the street. We know from the coroner Todd was struck by a single bullet in the back of the head which killed him almost instantaneously. It is extremely unlikely—verging on fanciful—to think the truck could have taken its curving route over 172 feet if Jason shot and killed Todd while the truck was still in the intersection and before Todd had begun to move it forward.

We also know Jason shot in the direction that would have been necessary to kill Todd as he was directing the car back to the westbound lane of Palm. The officers who processed the crime scene found a bullet inside a mobile home four lots to the west of the intersection on the south side of Palm. A bullet would not have landed there if Jason stopped firing when Todd turned to drive down Palm. In addition, the audio recording of the gunshots shows appellants fired all but one shot in a period of 11 seconds. But the final shot occurred 14 seconds later, long enough for Todd to have made it a good distance from Jason. The location of two of the shell casings from Jason's vicinity lend support to the same conclusion. Fourteen of the shell casings lay clustered approximately nine to 18 feet north of the utility pole on the northeast corner—Jason's location when the shooting began. But one shell casing lay near the corner and another in the intersection, giving the jury a basis to find Jason moved south and fired additional shots after Todd had driven away. Finally, we know the shot that killed Todd traveled directly

through the back window of the truck, through two driver's side headrests and struck Todd in the back of the head. This evidence too supports a jury finding that Jason shot Todd after Todd fled.

All of this evidence created an overwhelming basis for the jury to conclude Jason continued shooting even after he was out of danger. We cannot overturn his convictions for second degree murder and firing a gun into an occupied vehicle in the face of such evidence.

b. *Prejudice to heat of passion defense*

The fact Jason continued shooting after Todd drove away does not have the same negative consequence for his heat of passion defense.

“Murder involves the unlawful killing of a human being with malice aforethought, but a defendant who intentionally commits an unlawful killing without malice is guilty only of voluntary manslaughter. [Citation.] For purposes of voluntary manslaughter, an intentional unlawful killing can lack malice when the defendant acted under a ““sudden quarrel or heat of passion.””” ( *People v. Blacksher* (2011) 52 Cal.4th 769, 832.)

Voluntary manslaughter may also apply where a defendant acting with conscious disregard for life and knowing the conduct endangers the life of another, *unintentionally* but unlawfully kills in a sudden quarrel or heat of passion. ( *People v. Lasko, supra*, 23 Cal.4th 101.) “However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary

manslaughter.” (*People v. Wickersham* (1982) 32 Cal.3d 307, 327, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200.)

Consistent with these principles, the trial court instructed the jury appellants were not guilty of murder or attempted murder if they acted in the heat of passion.

(CALCRIM No. 570.) The trial court instructed the jury a killing or attempted killing is reduced to voluntary manslaughter or attempted voluntary manslaughter if they committed the offense “because of a sudden quarrel or in the heat of passion.”

(CALCRIM No. 570.) The trial court explained it should find heat of passion if appellants were provoked, as a result of the provocation they acted rashly and under the influence of intense emotion that obscured reasoning or judgment, and the provocation would have caused a person of average disposition to act rashly and without due deliberation. (CALCRIM No. 570.) Finally, the court instructed the jury “no specific type of provocation is required, slight or remote provocation is not sufficient,” and in deciding whether the provocation was sufficient, it must “consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.” (CALCRIM No. 570.)

The jury found Jason guilty of second degree murder, not voluntary manslaughter. The verdict shows the jury found he did not act in the heat of passion. (§ 192, subd. (a).) To determine whether the trial court’s errors prejudiced Jason, then, we must determine the likelihood, absent the errors, the jury would have found (1) Jason acted rashly and under the influence of intense emotion after Todd provoked him and (2) the provocation

was sufficient to have caused a person of average disposition to react in that manner. If the likelihood is high enough to undermine our confidence in the verdict, we must reverse the convictions. (*In re Hardy, supra*, 41 Cal.4th at p. 1036.)

Cody and Shaun gave consistent, detailed testimony they and Jason were going about their business when Todd attacked Shaun and then drove his truck at Jason. We set out this evidence in part II.D.1., *ante*, and there is no reason to repeat it here. In short, compelling evidence supports finding Todd accosted Jason in a threatening manner at Psycho's, accosted Shaun and Jason with his truck, picked a fistfight (with his cohorts) against Shaun, and then drove his truck straight at Jason. Compelling evidence also supports finding appellants were going about their own business when Todd attacked them at the corner of Lincoln and Palm—that they were on their way to Psycho's house so Shaun could investigate the nature of the dispute with Todd. Since a truck driven at a person is a deadly weapon, *People v. Russell, supra*, 129 Cal.App.4th at p. 782, this evidence was undoubtedly sufficient to warrant the jury in finding Todd provoked an emotional response in Jason that would have caused a person of average disposition to react rashly and not from reason. (See *People v. Castro* (1940) 37 Cal.App.2d 311, 315 [reducing jury verdict from murder to heat-of-passion manslaughter where evidence showed wife used knife against husband and dropped it and husband recovered the knife and stabbed wife].)

The jury also heard evidence of Jason's mental state. According to Lindsay, Cody, Shaun, and Johnny, Jason was angry and worried after the confrontation at

Psycho's. Johnny said Jason was cursing and ranting at Shaun's house before Shaun calmed him down and they left to talk to Psycho. Cody described Jason's state immediately after the shooting. He said he stopped to ask if Jason was alright. He said Jason was staring at Todd's truck in the field. Cody said Jason reacted by flipping around and pointing the gun at him. This evidence supports the defense theory that Todd's initial confrontation put Jason on edge and the later encounter put him into a state beyond normal reason and judgment—that is, it supports Jason's heat of passion defense.

The evidence of the Andre beating constituted a frontal attack on the claim Todd provoked Jason into reacting in violence. The point of that evidence was to establish Jason and Cody, not Todd, acted as the true provocateurs. The prosecutor argued the beating shows Todd's killing "was not unexpected. . . . It was an opportunity. It was an opportunity for Jason Schlig to kill the man who pissed him off and belittled him and called him names and said, 'I'll be driving your bike.'" The prosecutor later drew the connection to the heat of passion defense, arguing "Why wasn't this the heat of passion? . . . [¶] . . . This was the result of an opportunity taken advantage of. And what else tells us that is the Andre . . . incident. That's why that is, again, significant. When someone wrongs these men, they wrong them back tenfold."

The trial court's other errors exacerbated the same problem. The decision to exclude evidence that Todd had previously used his truck as a weapon against a member of the Brotherhood deprived the jury of corroboration that Todd used his truck to force Shaun off the road. If the jury credited that testimony, it would have been more likely to

conclude Todd was the aggressor. It also would have been more likely to conclude Jason responded as a person of average disposition when Todd then turned the car on him. Instructing the jury appellants could not claim justification for their actions if they had provoked the fight amplified the problem. A finding that Jason provoked the incident would have precluded the jury from deciding he acted in the heat of passion. Thus, the trial court improperly put its thumb on the scale in favor of finding Jason provoked the conflict.

As we have discussed previously, outside the mistakenly admitted propensity evidence, there was very little evidence Jason and Cody provoked the attack. At argument, the prosecution pointed to evidence that Jason and Cody armed themselves to shoot Todd, sought out Todd, and waited until he was alone to shoot him. This argument misconstrues the record. There is no evidence Jason took steps to arm himself. If anything, the evidence indicates he was already armed when Todd confronted him at Psycho's. While Jason did ask Cody to retrieve a gun, he asked Cody to deliver it to Psycho so he could defend his family if the Vagos started trouble at his house. Cody armed himself after talking to Jason, but he said it was to protect himself if Todd and the Vagos accosted him, not to attack Todd. Nor is there evidence Jason and Cody were seeking Todd out when Todd saw and accosted them. According to Shaun and Cody, they were headed back to Psycho's house to ask him about the earlier confrontation. The suggestion that Jason and Cody were lying in wait for Todd when Todd made a U-turn and chased them down has no basis in the evidence.

In the final analysis, the proposition that Jason and Cody provoked the attack turns almost entirely on the evidence Jason was extremely angry at Todd, uttered some vague threats while “ranting and raving,” and had on a previous occasion brutally beaten an associate of the Brotherhood that showed a propensity to turn to violence to solve problems. We conclude, absent the trial court errors, there is a reasonable probability the jury would have found Todd provoked the shooting and Jason reacted in a rash manner under the influence of intense emotion that obscured his judgment.<sup>27</sup>

We ask, finally, whether the heat of passion defense is made inapplicable if Todd fled and Jason fired the shot that killed him 14 seconds later. We conclude, based on *People v. Breverman* (1998) 19 Cal.4th 142 (*Breverman*) (abrogated on other grounds by amendment of § 189), the break in time makes no difference to our heat of passion analysis.

In *Breverman*, “a sizeable group of young men, armed with dangerous weapons and harboring a specific hostile intent, trespassed upon domestic property occupied by defendant and acted in a menacing manner.” (*Breverman, supra*, 19 Cal.4th at p. 163.) The young men challenged defendant to fight and then used their weapons to batter and smash the vehicle parked in his driveway. (*Ibid.*) “Defendant and the other persons in the house all indicated that the number and behavior of the intruders . . . caused immediate fear and panic.” The Supreme Court concluded “a reasonable jury could infer

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<sup>27</sup> Though the dissent disagrees with our prejudice analysis generally, it leaves unexplained why it differs with our conclusion the trial court’s errors prejudiced Jason’s heat of passion defense.



that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition.” (*Id.* at pp. 163-164.)

The defendant responded by shooting at his attackers from inside the house. He then came outside as they fled and fired again, killing one of the attackers with a gunshot to the back of the head. The trial court refused to give a heat of passion instruction to the jury on these facts. But the Supreme Court reversed because “[a] rational jury could . . . find that the intense and high-wrought emotions aroused by the initial threat had not had time to cool or subside by the time defendant fired the first few shots from inside the house, then emerged and fired the fatal second volley after the fleeing intruders.” (*Breverman, supra*, 19 Cal.4th at p. 164.) The bottom line, for the Supreme Court, was that the record contained substantial evidence from which a jury could conclude the defendant remained influenced by passion though he had caused his attackers to flee and had taken up a new position from which to fire as they fled.

The facts of *Breverman* are strikingly like the facts of this case. Cody and Jason fired a volley of shots at Todd lasting 11 seconds. Todd turned away from Jason and drove off down Palm. The evidence—interpreted against Jason—supports finding 14 seconds after the initial volley, Jason moved into the intersection, aimed at Todd, and fired a final, deadly shot. We have already concluded compelling evidence supports finding Jason acted in the heat of passion when he began firing. *Breverman* compels us to conclude the jury could reasonably have concluded the delay was short enough to find

Jason acted in the heat of passion even when he fired the final, delayed shot. But the evidence supporting the heat of passion defense is even more compelling in this case. In *Breverman*, the group who provoked defendant yelled and threatened him from outside his residence and began beating on his car. Here, the provocation was greater. Todd threatened Jason face-to-face and an hour later drove a truck at Jason and his friend. And unlike the defendant in *Breverman*, Jason stood exposed on the street, not safe in his home, when he began shooting. Cody added additional support when he reported Jason's dazed mental state immediately after the shooting. Taken together, we conclude there is compelling evidence for finding Jason's intense emotions had not had time to cool by the time Jason fired the final shot.

As a result, we conclude, absent the trial court's errors, there is a reasonable probability the jury would have found Jason guilty of voluntary manslaughter rather than second degree murder. Although Jason's conviction for second degree murder cannot stand, we are not required to unconditionally reverse the judgment. (*People v. Edwards* (1985) 39 Cal.3d 107, 118.) Where prejudicial error affects a greater offense of conviction, but does not affect a lesser offense, and the record establishes the defendant committed the lesser offense, the appellate court may remedy the error by modifying the judgment to a conviction for the lesser offense. (Pen. Code, §§ 1181, subd. (6), 1260; *People v. Kelley* (1929) 208 Cal. 387, 393 [reducing conviction from first degree murder to manslaughter based on sufficiency of evidence]; *People v. Garcia* (1972) 27 Cal.App.3d 639, 647-648 [reducing conviction from first degree murder to manslaughter

based on trial court's error placing burden to show mitigation on defendant]; *People v. Harris* (1968) 266 Cal.App.2d 426, 434-435 [reducing conviction from first to second degree burglary based on erroneous admission of evidence].)

However, because there was sufficient evidence in the record to support a conviction of second degree murder, the People may choose to retry Jason on that charge. (*People v. Edwards, supra*, 39 Cal.3d 107 at p. 118.) "Because we do not know which option the People would prefer, our disposition should preserve both options." (*Ibid.*) We will therefore reverse the jury's second degree murder verdict against Jason, but permit the People a period in which to accept a voluntary manslaughter verdict or retry him for second degree murder.

#### ***E. Limitations on Evidence of Witness Bias***

Appellants challenge two rulings of the trial court limiting evidence showing witness bias. The trial court (1) excluded evidence members and friends of the Brown family attacked Greg prior to his preliminary hearing testimony and (2) limited questioning of witnesses for bias against the Brotherhood.

We conclude these rulings were not erroneous, and they therefore provide no reason to alter our decision to give the People the option of accepting a voluntary manslaughter conviction of Jason Schlig on count 1 or to affirm his conviction on count 4 for discharging a firearm into a vehicle.

### 1. *Legal principles related to cross-examination*

The Sixth Amendment of the U.S. Constitution provides ““[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” This federal constitutional right to confront adverse witnesses in a criminal prosecution applies to the states [citation] and is also guaranteed independently by the California Constitution (Cal. Const., art. I, § 15) and by statute ([Pen. Code,] § 686).” (*People v. Wilson* (2008) 44 Cal.4th 758, 793.)

The right to confront witnesses includes the right to cross-examine them. (*People v. Burney* (2009) 47 Cal.4th 203, 230, superseded by statute on other grounds as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 981.) “[C]ross-examination is required in order ‘to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.’ [Citation.] ‘[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness. . . .’ [Citation.] The trial court, of course, has a ‘wide latitude’ of discretion to restrict cross-examination and may impose reasonable limits on the introduction of such evidence. [Citation.] Thus, ‘unless the defendant can show that the prohibited cross-examination would have produced “a significantly different impression of [the witnesses’] credibility” [citation], the trial court’s exercise of its discretion in this regard does not violate the Sixth Amendment.’” (*People v. Smith* (2007) 40 Cal.4th 483, 513.)

Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. We ask whether it is clear beyond a reasonable doubt a rational jury would have reached the same verdict absent the error. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 395.)

2. *Application to exclusion of evidence of attacks against Greg*

Appellants contend the trial court violated their Sixth Amendment right to confront witnesses by excluding evidence members and associates of the Brown family threatened Greg before he testified. We disagree.

a. *Additional background*

On cross-examination, Greg testified he was anxious and afraid as he was testifying, but he denied he was afraid he might be in danger unless he testified in a certain way. Cody's attorney asked Greg if he recalled telling an investigator that a person—later identified as a close family friend of the Browns—told him “it was all your fault.” The trial court sustained the prosecutor's relevance objection because the issue was “far afield” from the issues in the case. Cody's attorney argued evidence Greg received threats was admissible to assist the jury in determining his credibility.

Outside the hearing of the jury, Greg told the court he had been attacked by a Brown family friend before he testified at the preliminary hearing. He said the friend—someone Tyler treated as a cousin—approached him, said Todd's killing was Greg's fault, and punched Greg in the face. Greg also said he received text messages from Karl and the same family friend blaming him for Todd's death. Greg said his testimony had

not been affected by what had happened. He said he was not afraid there would be repercussions if he did not support the Brown family, and he did not talk to anyone from the Brown family or their associates about his testimony. He said he and Tyler are no longer friends and he no longer associates with the Browns.

Defense counsel sought to introduce evidence of these interactions to impeach Greg's testimony, but the trial court excluded the evidence under Evidence Code sections 350 and 352.

b. *Analysis*

The assault and statements that Greg was responsible for Todd's death were at least somewhat relevant to show Greg was motivated to provide testimony consistent with Tyler's testimony implicating Cody and Jason.

Greg said he was anxious and afraid as he sat on the witness chair. Outside the presence of the jury, he said he did not fear repercussions if he failed to support the Brown family and denied discussing his testimony with members of the Brown family. He also denied the assault and accusatory statements colored his testimony at the preliminary examination or at trial. However, his denials, while relevant, were not dispositive. The jury could have rejected his testimony and concluded the Browns had, by threat, both verbal and physical, and by invoking guilt, convinced Greg to tell a false version of the story.

Our concern is heightened by the fact Tyler's testimony was itself so riddled with inaccuracies and inconsistencies. For example, defense counsel showed Tyler's testimony differed in several important respects from his statements to a sheriff's department investigator. The evidence also showed Tyler lied to law enforcement to hide Greg's involvement in the events. If the jury had known Greg faced threats and accusations from the Brown family, it could have left a reasonable jury with the impression that Greg's testimony was designed to support testimony that was otherwise exceedingly weak taken on its own.

However, in the final analysis, we conclude the exclusion of the evidence was within the trial court's discretion. The attack and accusations were not explicit threats, they happened long before his trial testimony, and Greg testified he was no longer friends with Tyler and no longer spent time with the Brown family. Moreover, as we noted, defense counsel was able to impeach Tyler and Greg in other ways. We conclude the evidence was not likely to create in the jury "a significantly different impression of [the witnesses'] credibility." (*People v. Smith, supra*, 40 Cal.4th at p. 513.)

Even if we were to conclude the trial court erred, we conclude the error was harmless beyond a reasonable doubt. "Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-

examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.’” (*People v. Hernandez* (2012) 53 Cal.4th 1095, 1108, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) It is far from clear on these facts that further impeachment of Greg about the assault and accusations by the Brown family would have led a reasonable jury to reach a different verdict. (*People v. Bryant, Smith and Wheeler, supra*, 60 Cal.4th at p. 395.)

### 3. *Application to exclusion of evidence of bias against the Brotherhood*

Appellants contend the trial court violated their Sixth Amendment right to confront witnesses by limiting their ability to cross-examine Tyler and Karl about their potential biases. We disagree.

#### a. *Additional background*

Before trial, Cody’s attorney moved to introduce photographs taken from Karl’s and Tyler’s Facebook pages. One photograph depicted Tyler holding a black sweatshirt that read “F the Brotherhood” in green and Karl holding up both middle fingers toward the camera. A photograph taken at Todd’s funeral depicted Tyler sitting on a motorcycle and wearing a Vagos “prospect patch.”

Appellants’ attorneys argued the photographs were admissible to impeach Tyler’s preliminary hearing testimony that he had no connection with the Vagos, to show Tyler had the intent “to F the Brotherhood . . . by taking out [defendants] in any manner that he needs to,” and to assist the jury in determining whether Tyler and Karl were biased and had a grudge against the Brotherhood that would motivate them to lie. The prosecutor



argued the photographs should be excluded under section 352 because they had little probative value for impeaching Tyler and Karl's testimony.

The trial court concluded the photographs had little probative value, and defense counsel could impeach the witnesses using other means. The court also found the photographs unduly inflammatory, and that the words "F the Brotherhood" on Tyler's sweatshirt were ambiguous and explaining their meaning to the jury would require undue consumption of time. For that reason, the court excluded the photographs under section 352.

b. *Analysis*

We conclude the trial court did not abuse its discretion by limiting appellants' ability to cross-examine Tyler and Karl<sup>28</sup> for bias.

The photograph depicting Tyler holding an "F the Brotherhood" sweatshirt and Karl "flipping off" the camera and the photograph depicting Tyler at Todd's funeral sitting on a motorcycle and wearing a Vagos prospect patch were only marginally relevant. Tyler testified about his father's shooting death by persons associated with the Brotherhood, so the jury would expect him to harbor bias and animosity toward the Brotherhood. The jury would have likely concluded Karl, as Tyler's friend and a participant in the confrontation, shared that bias. The photographs would have added

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<sup>28</sup> As we noted, Karl did not appear at trial, and the parties read portions of his preliminary examination testimony to the jury. Appellants did not object he was available to testify or his prior testimony was otherwise not admissible, and therefore forfeited their confrontation clause claim. In any event, we address the merits.

only marginal support for that impression. In addition, the potential the photographs might prejudice the jury against Tyler and Karl outweighed the photograph's marginal relevancy. We conclude the trial court did not abuse its discretion in excluding the photographs under section 352. (*Jennings, supra*, 53 Cal.3d at p. 372.)

Even were we to conclude the trial court erred, the error was harmless beyond a reasonable doubt. Given the limited probative value of the evidence and the fact it largely confirms other evidence already presented regarding the witnesses' likely biases, we conclude a reasonable jury would likely have reached the same verdict even after further impeachment. (*People v. Bryant, Smith and Wheeler, supra*, 60 Cal.4th at p. 395.)

#### ***F. The Exclusion of Todd's Prior Convictions***

Appellants contend the trial court abused its discretion by excluding evidence of Todd's prior convictions for possessing a firearm for the benefit of a gang. They argue those prior convictions were admissible under section 1103(a) to prove Todd's violent character as well as to prove his association with the Vagos, which Tyler had denied.

We find no abuse of discretion, and therefore find no reason to alter our decision to give the People the option of accepting a voluntary manslaughter conviction of Jason Schlig on count 1 or to affirm his conviction on count 4 for discharging a firearm into a vehicle.

##### *1. Additional background*

Cody's attorney argued Todd's prior convictions were admissible to impeach Tyler's proposed testimony and to establish Todd's violent character. The court reserved

a ruling on the request until the court heard Tyler's testimony and until Cody's attorney obtained certified copies of the prior convictions.

Tyler said Todd had previously been a member of the Vagos, but he believed his father left the club in 2003. During cross-examination, Cody's attorney asked Tyler if his father had friends who were members of the Vagos. Outside the presence of the jury, the trial court sustained an objection on relevancy grounds by the prosecutor. Cody's attorney argued Todd's continued friendship and association with active members of the Vagos was relevant to provide context to Todd's statement at Psycho's house that he was making a "club issue" about the situation. The court ruled counsel could ask Tyler about Todd's continued friendship with members of the Vagos only if Tyler said he understood what "club issue" meant. Tyler then said he had no idea what a "club issue" was.

Appellants' attorneys sought to admit certified copies of Todd's prior convictions to impeach Tyler's testimony that Todd had not been a member of the Vagos since 2003. The prosecutor argued they were attempting to "backdoor" the prior convictions into the case by impeaching Tyler. The court ruled the prior convictions were not relevant to impeaching Tyler's testimony, and the probative value of the priors was outweighed by the risk of making the jury think this was a gang case, something all parties agreed should be avoided.

## *2. Legal principles*

As we have discussed, section 1103(a) creates an exception to the general prohibition on admission of character evidence when a *defendant* offers evidence

regarding the character or trait of a *victim*. ““It has long been recognized that where” as here “self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible.”” (*People v. Wright, supra*, 39 Cal.3d at p. 587.)

However, the trial court may exclude such admissible evidence if allowing it would have confused the issues at trial, consumed too much time, or been more prejudicial than probative. (*Gutierrez, supra*, 45 Cal.4th at pp. 827-828.) We review a decision to exclude such evidence for abuse of discretion. (*Id.* at p. 827.)

### 3. *Analysis*

We conclude the prior convictions were relevant to impeach Tyler’s testimony about his father’s involvement with the Vagos and to show Todd was inclined to violence, but conclude the trial court did not abuse its discretion by excluding the evidence under section 352.

The prior convictions were probative of Tyler’s credibility and Todd’s continuing involvement with the Vagos. Though Jason and Cody did not know about Todd’s prior convictions at the time of the shooting, if the jury had known about them at trial, it would have been more likely to make findings in line with appellants’ justification defenses. The prior convictions, which occurred in 2006, contradict Tyler’s testimony his father terminated his association with the Vagos in 2003. If the jury had known about the convictions, it is more likely it would have rejected Tyler’s testimony and credited Cody’s and Shaun’s testimony that Todd threatened to get the Vagos involved in the dispute. If the jury credited appellants’ version of events, they would have been more

likely to find Cody and Jason reasonably believed Todd was attacking Jason with his truck.

The evidence also could support the argument Todd was unarmed because he knew possessing a firearm would send him back to prison. Todd had served a term in prison for possessing a firearm for the benefit of a criminal gang. That conviction and imprisonment indicates Todd knew had he been found with a firearm, he would have faced being charged with being a felon in possession of a firearm (former Pen. Code, § 12021, subd. (a)(1)) and being sentenced to another term in prison.<sup>29</sup> Thus, even setting aside the gang connection, his prior convictions undermine the prosecution's portrait of Todd as a peaceable, law-abiding citizen who did not expect or provoke a fight.

However, we cannot conclude the trial court abused its discretion by excluding the evidence as unduly prejudicial. Todd was convicted of being a felon in possession of a firearm for the benefit of a criminal street gang. The trial court reasonably concluded introducing such evidence may have been confusing, consumed trial time unnecessarily, and been cumulative of other evidence. The parties agreed before trial not to describe the Vagos and the Brotherhood as gangs and conducted the trial accordingly. Describing the Vagos as a gang may have required the parties to explain both motorcycle clubs could be considered gangs and may have opened other tangential issues. The fact that the parties

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<sup>29</sup> The Legislature repealed former section 12021, subdivision (a)(1) effective January 1, 2012, but reenacted its provisions without substantive change as section 29800, subdivision (a)(1). (*People v. Sanders* (2012) 55 Cal.4th 731, 734, fn. 2; Stats. 2010, ch. 711, § 4, b.)

did not identify a succinct, comprehensible way of introducing the gang-related convictions is important to our conclusion.

Even if the parties had done so, the evidence would not have added much. (See *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1845 [trial court did not abuse its discretion by limiting evidence as cumulative under Evidence Code section 352].) As we have noted, defense counsel elicited significant evidence showing Todd's continued involvement in the Vagos and a great deal of evidence undermining Tyler's testimony, both generally and in respect to his testimony Todd had quit the motorcycle club. Defense counsel also elicited compelling evidence Todd instigated the fight at Lincoln and Palm. Under such circumstances, we cannot conclude the trial court abused its discretion by excluding evidence concerning the prior convictions.

### **III**

#### **DISPOSITION**

We reverse the judgment as to counts 1, 2, and 3 against Jason Schlig and remand for further proceedings consistent with our opinion. As to count 1, the People may elect to retry him for second degree murder. However, if the People fail to bring defendant to a new trial in a timely manner (see Pen. Code, § 1382, subd. (a)(2)), our remittitur shall be deemed to modify the verdict by reducing the conviction from second degree murder to voluntary manslaughter, and the trial court shall promptly resentence him. We affirm the judgment as to count 4.

We reverse the judgment as to counts 1 and 4 against Cody Young.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH

J.

I concur:

CUNNISON

J.\*

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\* Retired judge of the Riverside Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[*People v. Schlig et al.*, E057723]

McKINSTER, J.

I respectfully dissent.

I.

INTRODUCTION

There is much in the majority opinion with which I agree. Specifically, I agree with the majority's conclusions that: (1) the evidence of the Andre<sup>1</sup> beating was inadmissible under Evidence Code section 1101, subdivision (b), to prove defendants' intent to kill and, therefore, was pure propensity evidence because the beating did not share sufficient similarities with the shooting death of Todd and the alleged attempted murders of Tyler and Greg; (2) the evidence strongly tended to show Todd provoked the quarrel that culminated in his shooting death, so the trial court should not have instructed the jury with CALCRIM No. 3472 that defendants had no right to use force in self-defense or in defense of another if *they* provoked the quarrel; (3) exclusion of the evidence tending to show Greg was a biased witness, and limitation on cross-examination of witnesses to establish bias against the Brotherhood Motorcycle Club (Brotherhood), was not prejudicial error; (4) the trial court properly excluded evidence of Todd's prior convictions as overly prejudicial under Evidence Code section 352; and (5) Jason's conviction for discharging a firearm into an occupied motor vehicle must be affirmed.

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<sup>1</sup> I will follow the majority's convention of referring to the participants in this tragedy by first names. (See Maj. opn., p. 6, fn. 5.) I mean no disrespect by the use of their first names.



My principle disagreement with the majority, which leads me to respectfully dissent, is the majority's conclusion that defendants were prejudiced as a matter of state constitutional law by the trial court's evidentiary and instructional errors. Contrary to the majority, I conclude defendants were not prejudiced by the erroneous admission of evidence of the Andre beating, and it was not reasonably probable they would have obtained a more favorable result had the evidence been excluded.

I also disagree with the majority that the trial court erred by excluding evidence of a prior act of road rage perpetrated by Todd against a member and associate of the Brotherhood. Although the road rage incident bore striking similarities with the events that immediately preceded the shooting, I conclude the evidence was only relevant to proving Todd tried to run Jason and Shaun off the road and was not relevant to proving defendants acted in self-defense or in defense of another when they fired their weapons at Todd. Moreover, because defendants had no knowledge of the road rage incident, it was irrelevant to proving defendants acted in the heat of passion when they shot at Todd.

I must also respectfully disagree with the majority's cumulative error analysis. The erroneous admission of the Andre evidence and the erroneous self-defense instruction, neither separately nor cumulatively, prejudiced defendants.

Because I disagree with the majority's prejudice analysis, I must respectfully dissent from the judgment reversing Cody's convictions for voluntary manslaughter of Todd and for discharging a firearm into an occupied vehicle, and from the judgment

reversing Jason's convictions for second degree murder of Todd and attempted murder of Tyler and Greg.<sup>2</sup>

## II.

### PROCEDURAL BACKGROUND AND FACTS<sup>3</sup>

#### A. *Incident at Tap Daddy's, March 2010*

Tap Daddy's was a bar and concert venue in San Jacinto, California, owned by a woman named Cari. The bar was regularly frequented by members of motorcycle clubs, including the Vagos, the Mongols, and the Brotherhood. In March 2010, a tribute band performed at Tap Daddy's. Shaun, who at the time was sergeant at arms for the Brotherhood, worked security at the bar during some concerts. Todd, who had been a member of the Vagos,<sup>4</sup> was at Tap Daddy's on the night of the concert and spoke to Shaun before the concert started. Tyler and his friend Greg arrived in Greg's vehicle; Todd left about 10 minutes later.

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<sup>2</sup> Having reversed Cody's convictions, the majority does not address his argument that the trial court erred by limiting the evidence he could introduce of violent acts originally attributed to the Vagos to prove his state of mind. (Maj. opn., at p. 4, fn. 2.) Because I would affirm Cody's convictions, I address, but ultimately reject, that argument in my discussion. (See dis. opn., *ante*, § III.C.)

<sup>3</sup> I must apologize to the reader in advance for adding to the majority's factual discussion with my own. Because my view of the facts differs in several respects from the majority's, I am afraid the duplication cannot be avoided.

<sup>4</sup> Tyler testified Todd had previously been a member of the Vagos, but that he believed his father stopped being a member of the Vagos in 2003. Shaun testified he met Todd a year and a half before the shooting, at which time Todd introduced himself as a member of the Vagos. Shaun saw Todd on numerous occasions at Tap Daddy's in the company of members of the Vagos and the "Green Machine," and he never heard anything about Todd retiring from or no longer being a member of the Vagos.

Later, Shaun saw Greg in the upstairs VIP section of the bar, and asked Greg to leave because he was not wearing a VIP wristband. Greg testified Shaun called him a “bitch” and told him to “[g]et the fuck out of here,” and that two or three men were with Shaun. Shaun denied cursing at Greg or that he was with anyone else in the VIP section. Greg then left the VIP section and walked outside the bar to speak with Tyler, who was on the phone with his father. Greg told Tyler that he had been kicked out of the bar; that Shaun “punked” him out and threatened to beat him up; and that he and Tyler needed to leave. Tyler told Todd that he had to come back to the bar.

When Todd arrived back at the bar, he asked for Shaun. The two walked to the parking lot, and Todd angrily confronted Shaun, yelling and asking why he was “punking out his kid.” When Shaun denied that he “punk[ed] out” Tyler or Greg, Todd told Shaun, “Tyler and [Greg] are official hang-arounds. Can’t you see their green shoes?” The Vagos wear the color green, so Shaun understood Todd to mean that Tyler and Greg were associates of the Vagos who wished to become members. Todd then yelled at Shaun, telling him, “You’d better watch who the fuck you’re talking to because, you mess with these kids, you’re messing with the club,” meaning the Vagos.

At the same time Todd and Shaun were talking, Tyler “sucker-punched” a man named Jeff who was approaching Todd and Shaun. Tyler told his father that Shaun took a swing at him. When Shaun denied that he tried to hit Tyler, Todd punched Shaun in the face. Tyler testified that his father hit Shaun after Shaun swung at Tyler and missed, which Shaun denied. Shaun kept his hands behind his back, and he did not retaliate or hit back when Todd punched him. Shaun considered Todd a friend and did not want the

situation to escalate further. Todd then seemed to calm down a bit and said something to the effect about talking to Shaun later or “[w]e’ll handle this later.” Todd, Tyler, and Greg then started to walk toward Todd’s truck. As Greg walked past Shaun, Shaun apologized to Greg for any disrespect and shook his hand. Todd, Tyler, and Greg then drove away.

A few days later, a mutual friend of Todd and Shaun set up a meeting during which they had a friendly conversation and patched things up. Todd apologized for punching Shaun, saying he had been drinking. Shaun felt he and Todd were back on good terms after their meeting. Shaun occasionally socialized with Todd between the meeting and the instant offense. Sometime after the meeting, both Todd and Tyler even helped Shaun perform some repairs on Shaun’s motorcycle.

B. *Andre Beating, July 14, 2010*

On July 14, 2010, Jason, Andre, and a third man went to Cody’s house. Jason and the third man were members of the Brotherhood. Andre was a “hang-around” or supporter of the Brotherhood, but he was not a member. Cody did not own a motorcycle and was not a member of the Brotherhood, but he had friends and acquaintances who were members.

The third man told Cody that Andre had been having a sexual relationship with an underage girl, and that people who knew about it were unhappy. Cody did not know who the underage girl was. Andre was confronted with the accusation and shown a letter and some diary entries from the underage girl, as well as a letter from Planned Parenthood. Andre was then given the choice of going to the police and admitting he had sex with an

underage girl, or subjecting himself to a three-on-one fight. He chose the three-on-one fight. If Andre had not chosen the three-on-one fight, Cody, Jason, and the third man would have taken their evidence to the police.

Cody, Jason, the third man, and Andre then drove to Idyllwild. They went to an area of Idyllwild called Pine Cove, arriving after dark. Andre stripped down to his boxer shorts and removed his shoes for the fight. Andre was permitted to fight back, and he threw the first punch. Cody, Jason, and the third man punched and kicked Andre during the fight. None of them had a weapon. When the fight was over, Andre sat on the ground. Andre was bleeding, but he was talking and coherent. The other three men then left.

Andre contacted a resident he knew in the Idyllwild area, who contacted the police. Andre was taken to the hospital where he was treated for swelling and bruising to the inside of his cheek, as well as fractures to his nasal bones, upper jaw, and the orbital bone beneath his eye. Andre also suffered facial lacerations and three lacerations to his scalp, which were treated with staples.

C. *Events of August 29, 2010*

1. Shaun moves to a new house.

On the morning of August 29, 2010, Shaun rode his motorcycle to Cari's house to borrow her Chevy truck because he was moving from his old house on Girard Street to his new home on Eighth Street. As was his custom since he had an accident while on a motorcycle ride and suffered road rash and other injuries, Shaun wore a protective bulletproof vest when he rode to Cari's house. Shaun's brother and a number of friends,

including Cody and Jonathan, helped with the move. Cody borrowed Jason's blue Suburban to help with the move. After helping with the move, Cody went to a nearby friend's house and spent some time there.

## 2. Encounter between Tyler and Jason at gas station.

On the afternoon of August 29, 2010, Tyler and his friend Karl were hanging out at Tyler's house. Later, the two left the house and walked to get cigarettes from a nearby gas station at the corner of Lincoln and Florida. When they walked inside, Jason and his girlfriend, Lindsay, were in line at the register.

Jason spoke to Tyler, then all four walked outside to the parking lot. Jason told Tyler he was sorry to hear Todd was seriously hurt and in the hospital. Tyler told Jason that his father was not in the hospital. Jason then told Tyler that he and his "boys" were still angry about what happened at Tap Daddy's. Tyler told Jason he would talk to his father. The two men then shook hands and went their separate ways.<sup>5</sup> Tyler and Karl walked back to Tyler's house, and Jason and Lindsay rode on Jason's motorcycle to the home of a friend who went by the nickname "Psycho."

Todd arrived home a few minutes after 7:00 p.m. Tyler told his father about the conversation with Jason at the gas station, and told him what Jason had said about he and his "boys" still being angry about the incident at Tap Daddy's. Todd was angry that

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<sup>5</sup> After the instant offense, Tyler told a sheriff's department investigator that everything was "cool" after his conversation with Jason at the gas station, and that nothing was said that would make him think there would be problems in the future. Tyler did not tell the investigator that Jason said, "he and his boys were still pissed off" about what happened at Tap Daddy's.

Jason would talk to Tyler about what happened instead of speaking to him directly.

Todd, Tyler, and Karl then drove to Psycho's house to look for Jason.

3. Todd confronts Jason at Psycho's house and says there is a "club issue."

When Todd, Tyler, and Karl arrived at Psycho's house, Jason's motorcycle was parked in the driveway. Todd walked up and banged loudly on the side of Psycho's mobilehome. Todd yelled out, "Who the fuck's bike is this?" Psycho opened the door, and Todd asked for Jason.

When Jason walked outside, Todd confronted him about what happened earlier at the gas station. Todd asked Jason why he was asking about matters that did not concern him. Todd said Jason's motorcycle was "a piece of shit," and told Jason to stop messing with his son. Todd also told Jason that one day he would own Jason's motorcycle. Finally, Todd said he was making a "club issue" about what happened, and told Jason to call the president<sup>6</sup> of the Brotherhood. Todd, Tyler, and Karl then left and drove back to the Brown residence.

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<sup>6</sup> Lindsay testified that Todd told Jason to call his "SA" or "sergeant at arms," who she knew to be Shaun.

4. Jason called Shaun, Cody, and Jonathan; Shaun and Cody then drove to Psycho's house.

As Shaun drove to Cari's house to return her truck, he received a phone call from Jason. Jason told Shaun about his conversation with Tyler at the gas station, how Todd had confronted Jason at Psycho's house, and that Todd was going to make a "club issue" about what happened. Shaun tried to calm Jason down, and told Jason to meet him at his house to discuss the issue. After dropping off Cari's truck, Shaun put back on his protective vest and rode his motorcycle home.

Psycho asked Jason to get a gun for him to protect his family. Jason then called Cody and told him about the confrontation at Psycho's house, that Todd said he was making a "club issue" out of what happened, and asked Cody to bring a gun to Psycho. Cody testified he was concerned about Todd saying he was making a "club issue," and feared he and his friends might be targeted by members of the Vagos. Cody took a Colt .32-caliber revolver owned by Jason and bullets to give to Psycho. For his own protection, Cody took a Glock handgun also owned by Jason. Jason also called Jonathan and told him what happened. Jason was angry and upset about being confronted by Todd, and said he wanted to "fuck Todd up." Jason then left Psycho's house and went to Shaun's house.

When Jason arrived at Shaun's house, Jonathan was there. Jason again told Jonathan that he was angry about being confronted by Todd, and told Jonathan that Todd had called the Brotherhood a "pussy club." Jason again told Jonathan that he wanted to "fuck Todd Brown up," and said he wanted "to kill him." Shaun arrived home shortly



thereafter. He did not remove his protective vest. Jason told Shaun that the encounter with Tyler at the gas station was friendly. He also told Shaun that Todd showed up at Psycho's house yelling and screaming; accused Jason of "punking out his son"; mentioned a "club issue" and told Jason to "[c]all your president" or "[c]all Spicher"; and said something about one day owning Jason's motorcycle.

Jonathan offered to call Todd to calm the situation down because he was friends with Todd, but Shaun said there was no need and that he wanted to give Todd a couple of days to cool off before they talked to him. Shaun testified he believed there might be an issue between his and Todd's motorcycle clubs. Shaun told Jason he wanted them to go talk to Psycho, whom Shaun had never met, to find out more about what happened and to make sure non-club members did not get involved further.

Around the same time, Cody went to Psycho's house and gave him the revolver to protect his family. Lindsay and Psycho told Cody about the meeting between Jason and Tyler at the gas station and that Todd had come over and banged on the door. Psycho also told Cody that Todd drove a black Toyota truck. Cody then left and drove to Shaun's house.

When Cody arrived at Shaun's house, Jason told Cody that he was going to Psycho's house to make sure everything was okay and to hear what Psycho had to say about the confrontation earlier that evening. Shaun and Jason then rode off on their motorcycles to Psycho's house, with Jason leading the way. Jason was wearing a blue button-down shirt, but did not have a bulletproof vest on. Jason was known to regularly

carry one or two firearms with him, and both Shaun and Cody assumed he was armed that night.

5. Todd, Tyler, Karl, and Greg go get pizza.

After Todd, Tyler, and Karl arrived back at the Brown residence from Psycho's house, Tyler called Greg and asked him to come over. Tyler told Greg that "some guys were starting trouble with him," and asked Greg to come over in case anything happened. When Greg arrived at the Brown residence, Tyler told Greg that Jason wanted to beat Greg up because he was a liar.

Greg, Tyler, and Karl drove around the neighborhood to make sure nobody was watching the house and returned five minutes later. When the three men arrived back at the house, Greg told Todd that he had just turned 21 years old, and asked if he wanted to get some pizza and beer. Todd, Tyler, Karl, and Greg then drove off in Todd's truck to get pizza.

6. Todd encounters Shaun and Jason on Lincoln.

As they left Shaun's house, Jason and Shaun rode north on Eighth Street and turned right on Palm. Cody drove off from Shaun's house just as Jason and Shaun made the right turn, and he was about half a block behind them. Cody was armed, but he was not expecting trouble and was not wearing a bulletproof vest.

At the corner of Lincoln and Palm, Jason signaled to Shaun to turn right on Lincoln. The two motorcyclists turned right and drove down Lincoln. After passing about three streets, Jason signaled to Shaun that they were going the wrong way and to make a U-turn before the corner of Lincoln and Florida, where the gas station was

located. The two motorcyclists then turned into a street with a cul-de-sac, turned, and rode back down the other way. Jason made his U-turn sooner than Shaun, so Jason was out in front of Shaun by about two car lengths. Jason turned right or northbound on Lincoln.

About the same time, Todd drove south on Lincoln in the direction of the gas station, although the pizza parlor was in the opposite direction. Tyler and Karl testified they saw two motorcycles riding behind Todd's truck, and that the motorcycles turned around and rode north on Lincoln. Greg testified the motorcycles were on Florida and made a left turn onto Lincoln. Todd made a U-turn at or just before the gas station, and followed the motorcycles.<sup>7</sup> Karl, Tyler, and Greg testified the motorcycles rode up to the stop sign at the intersection of Lincoln and Palm. Todd drove up from behind and stopped between the two motorcycles at a slight angle to the right. Jason's motorcycle was on the left, and he rode through the intersection. The motorcycle on the right, ridden by Shaun, stayed at the stop. Tyler and Greg testified Todd did not cut off Shaun or try to hit or run either of the motorcycles off the road.

Shaun testified that when he was about five feet from the corner and about to make a right turn northbound onto Lincoln, after making his U-turn in the cul-de-sac, he noticed a black truck across the way that looked like it was going to turn left or northbound onto Lincoln. As Shaun proceeded to make a right turn onto Lincoln, the

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<sup>7</sup> Tyler told the sheriff's department investigator that two motorcycles were following Todd's truck, that the motorcycles passed the truck, and that the motorcycles then turned around. He did not tell the investigator that Todd made a U-turn and followed the motorcycles.

black truck swerved in front of Shaun and forced Shaun to ride in the gutter. Tyler was in the front passenger seat of the truck, and was hanging out the open window screaming at Shaun. Tyler yelled at Shaun by name and said something to the effect of “[w]hat the fuck you doing in my neighborhood, motherfucker? We’re gonna get you.” Shaun continued to ride down Lincoln with the truck crowding him toward the curb. Shaun tried to accelerate to get away from the truck, but the truck accelerated and continued to crowd Shaun closer to the curb. Shaun recognized the driver as Todd, who was also yelling at Shaun. Shaun saw Jason riding up ahead of him on Lincoln.

As Shaun approached the corner of Lincoln and Palm, the truck pulled slightly ahead of Shaun and at the intersection cut Shaun off at a 45-degree angle and stopped, blocking Shaun’s progress. Jason had continued riding ahead north on Lincoln through the stop sign at Palm. The truck did not hit Shaun. Shaun slammed on his brakes and came to a stop about the same time as the truck.

Cody testified that after he had made a right turn from Palm onto Lincoln to follow Jason and Shaun, he saw Jason ride past him in the opposite direction. Cody then saw Shaun and a black Toyota truck on Shaun’s left that “blew by” him going north on Lincoln. Cody saw that Jason went through the intersection at Lincoln and Palm without stopping. Over his left shoulder, Cody saw the black truck “come out a little bit to the left and swerve all the way to the right” in front of Shaun’s motorcycle. Cody thought the truck hit Shaun. Cody then made a U-turn.

7. Todd, Tyler, Greg, and Karl attack Shaun at the corner of Lincoln and Palm.

Tyler and Greg testified that when Todd pulled up alongside Shaun's motorcycle, Shaun reached for the handle of the front passenger door where Tyler was sitting. Todd looked over at Shaun, said, "[f]uck that," and jumped out of the truck. Shaun testified the passenger door to the truck started to open before Todd came to a stop, that he came to a stop with his motorcycle pointed slightly behind the front passenger door of the truck and not alongside it, and that he did not reach for the door handle but had both hands on the handlebar of his motorcycle.

Todd ran to Shaun and punched him in the helmet, which caused Shaun to fall over on his motorcycle into the truck.<sup>8</sup> Tyler, Greg, and Karl also got out of the truck and started fighting with Shaun. Shaun tackled Karl to the ground, got on top of him, and started punching him. Tyler and Greg tried to pull Shaun off Karl and punched Shaun in his sides. As they pulled on Shaun's jacket, Tyler and Greg felt that Shaun was wearing a bulletproof vest.

Shaun testified that after he came to a stop, Tyler came toward him like he was about to strike. Shaun tried to protect himself, but Karl knocked Shaun over and the motorcycle fell in the direction of the truck. Shaun was on his knees trying to block and fight back as Todd, Tyler, Greg and Karl punched and kicked him. Shaun then grabbed

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<sup>8</sup> Tyler testified that Shaun was wearing a "cut"—a jacket with patches for the Brotherhood. Greg testified Shaun was wearing a jean jacket with the color yellow and a patch on it. The Brotherhood's colors were black and yellow. Shaun and Cody testified that Shaun and Jason were not wearing their "cuts" at the time of the shooting.

Karl by the leg, pulled him down to the ground, got on top of him in a “mount position,” and started punching him. Shaun did not feel anyone grabbing or pulling at him from behind. Todd then punched Shaun in the face and moved out of Shaun’s field of vision.

8. Cody pulls up in Jason’s blue Suburban behind Todd’s truck. Cody and Jason fire their guns.

A blue Chevy truck or sport utility vehicle (SUV) stopped behind Todd’s truck.<sup>9</sup> Tyler testified that Cody got out of the vehicle and started shooting at Todd.<sup>10</sup> Todd ran back to his truck and yelled, “Run, Tyler. Guns, guns, guns.” Tyler ran off toward his house. As he ran, Tyler heard shots being fired at him from where Jason was standing, and he heard the tires from Todd’s truck spinning when he slammed on the gas. Tyler also testified he heard gunshots coming from where the vehicle had stopped behind Todd’s truck.

Greg testified that when he took off running, he saw someone across the street near a motorcycle firing a gun, and he heard gunshots coming from where the blue Chevy had stopped behind Todd’s truck. Greg heard more than 20 shots fired as he ran toward some nearby homes.

Karl testified he saw the driver’s side door to the SUV open, then he heard gunfire. Karl saw Jason’s motorcycle, and he saw Jason walking and firing a gun at Todd. Karl testified that, as Todd drove away into a nearby field, Jason continued firing

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<sup>9</sup> Greg and Karl testified that a second vehicle pulled up from the opposite direction.

<sup>10</sup> Tyler told the sheriff’s department investigator that he never saw the driver of the SUV.

his gun at Todd's truck. Todd's truck then crashed into some trees and a fence. Finally, Karl testified he saw Cody "dry-firing" his empty handgun at him.

Cody testified that as he drove up to the intersection in Jason's Suburban, he saw three men on top of Shaun and one man under Shaun. Jason was further up Lincoln on the other side of the intersection. Cody saw Todd run around to the open driver's side door of the truck, lean and reach inside the vehicle, and walk toward the back of the truck with a chrome or metallic object in his hand, which Cody thought was a knife or other weapon. Cody tried to stop close enough to the back of the truck to prevent Todd from walking over to Shaun, but he stopped short and Todd walked between the two vehicles to where Shaun was. Cody reached out the driver's window with the Glock handgun in his left hand, and fired one shot into the air. Cody testified he did not fire at Todd. Todd turned back and ran to the driver's side of the truck. The two men on top of Shaun continued to punch and kick Shaun, so Cody got out of the Suburban and fired a second shot into the air.

Cody testified that Todd straightened out the truck and started to drive northbound on Lincoln straight at Jason. Jason pulled his gun out and shot at the front of the truck, but it continued coming toward Jason. Cody then fired four shots into the back of the truck to try and stop Todd from killing Jason. Cody testified he was standing when he fired at Todd's truck, and that he did not get down on one knee. Todd's truck then fishtailed and made a wide turn to the left. The truck's rear slid but continued to drive toward Jason, and Jason continued to fire at the truck. Cody saw Todd frantically turning the steering wheel to the right to correct the left turn. The truck drove west on Palm, and

Jason stopped firing at it. The truck then entered a field to its right. Cody looked over at Shaun and saw he was still fighting with one man underneath him. He did not point his gun at Karl. Cody asked Shaun if he was all right. After getting no response, he jumped back into the Suburban and drove off.

Shaun testified that as he was on the ground fighting Karl and being kicked and punched by the others, an SUV pulled up and came to a stop behind Todd's truck. Shaun did not see who the driver was. A few seconds later, Shaun heard a gunshot, which sounded like it came from near the SUV, and his assailants fled. Shaun heard a second and third gunshot from the same direction, and then saw Todd's truck drive away. Shaun then heard a volley of gunshots, which sounded like it came from the north side of Palm, the direction in which Jason had ridden.

Shaun looked down and asked Karl why he had attacked him. Karl responded, "I wasn't with those guys. They threw me on top of you." Shaun got off Karl and told him to leave. Karl ran away. Shaun picked up his motorcycle and saw it had damage to the clutch lever and the left mirror was shattered. The motorcycle would not start. Two men from a nearby mobilehome park walked over and asked if Shaun was okay, then helped Shaun push his motorcycle to the entrance of the mobilehome park. A deputy with the Riverside County Sheriff's Department pulled up just then and detained Shaun.

9. Immediate aftermath of the shooting.

Jason called Lindsay and told her he needed a ride from White Oak and Palm. Lindsay asked Stephanie, her brother's girlfriend, to drive. Lindsay said it was an emergency and that Jason needed a ride. Stephanie, Lindsay (who had her toddler son



with her), and Lindsay's brother, James, drove to the Valle Vista area of Hemet and picked up Jason, who was on foot. Jason was extremely out of breath, looked shaken up and excited, and spoke rapidly. They drove back to Lindsay's home.

Cody showed up at Lindsay's home sometime later. Stephanie saw that Jason had a gun. She was not sure if Cody had a gun. Lindsay testified that during a conversation between Jason and Cody, Jason said he had been involved in a shooting that evening after Shaun had been attacked by at least three other men. Jason said he emptied three clips from his gun in less than a minute in the direction of Todd's truck, and that he thought Todd was dead. Lindsay testified Jason was excited as he spoke, and he appeared to be bragging. Lindsay also testified she heard Cody say he was involved in the shooting, and that he got down on one knee and fired four times at Todd's truck. Cody was excited and seemed to be thrilled as he spoke. Jason and Cody never discussed that they had planned an ambush or assault.

Stephanie testified she overheard Jason talking about a confrontation at the gas station earlier in the day, and that there had been a misunderstanding. When Stephanie spoke to Jason, he was "[v]ery excited, very wound up." Stephanie overheard Jason say he fired a weapon, and that he unloaded one and a half or two and a half clips. Jason also said that before everything took place, he had "suited up" and that "the way in which he had been suited up was better than the troops in Iraq." Stephanie also heard Jason say a truck went into a ditch and stopped, and Stephanie got the impression that the shooting took place after someone ran a club member off the road. Jason said he skidded or laid down his motorcycle in front of the truck to try and stop it.

Later that night, James heard someone in the kitchen possibly washing dishes. The next morning, his mother, Vicki, asked James if he had used all the dish soap. James did not see anyone wash their hands in the kitchen the night before. Vicki testified she spoke to Jason that morning, and that she saw a gun sticking out of his waistband. When Vicki went to do the dishes, she noticed the dish soap was gone. Vicki testified she overheard Jason and some unknown persons in the living room discussing a shooting that occurred the night before, and she heard Jason say he emptied three clips.

After leaving Lindsay's house on the night of the shooting, Cody went to Shaun's house and spent the night there to make sure no members of the Vagos retaliated against Shaun's family. The next morning, Cody drove Shaun's wife to Joshua Tree. After returning to Hemet, Cody returned the Suburban to Jason at Lindsay's house.

#### *D. Days Following the Shooting*

Sometime after the shooting, Cody bought two bulletproof vests. Cody had another man deliver a gun to Jason before Jason was arrested. Cody left for Palm Springs the day before Todd's funeral because there were a lot of members of the Vagos in town for the funeral. He wore his bulletproof vest and took a firearm with him.

A few days after the shooting, Cody called James and asked him to clean out the saddlebags on Jason's motorcycle. Cody then went to Lindsay's home to retrieve a bag in which James placed the items from Jason's saddlebags. Cody then took the bag to a friend's house. Cody testified that a bag containing Brotherhood related items that the police had found in Jason's Suburban was not the same bag he received from James.

Cody said the bag given to him by James contained T-shirts, a bandana, Jason's "cut," and a pair of sunglasses.

Four or five days after the shooting, Cody went to Lindsay's house. He took the gun he had fired on the night of the shooting to return it to Jason, and once there he gave it to a man who was with Jason. Cody did not know who this man was, and he did not know if the man was a member of the Brotherhood. Cody did not know what happened to the gun after that.

Lindsay asked Stephanie to rent a car so Lindsay and Jason could drive to San Diego.

#### E. *Investigation and Arrests*

Officers with the Riverside County Sheriff's Department responded to reports of shots fired at the corner of Lincoln and Palm Avenues in Hemet. The first deputy on the scene detained Shaun as he and two other men pushed Shaun's motorcycle toward the entrance of a nearby mobilehome park. Officers learned that two nearby mobilehomes were struck with bullets.

Todd's truck was found parked in a field with its headlights on and the engine running. The investigating deputies observed that the truck appeared to have driven off the road, over some bushes, and through a fence. The deputies found Todd inside the truck with his left arm resting on the driver's side door, his right arm at his side, and his head slumped forward. Todd had a hole in the back of his head. The deputies were unable to detect a pulse or breathing, and concluded Todd was dead. The deputies

observed bullet holes in the truck's tailgate and driver's side rear window, and the front windshield was damaged. They saw no weapons inside the truck.

A detective discovered broken glass in the roadway. The detective observed Shaun's motorcycle, and saw that it had damage to the clutch lever, a broken left mirror, and scratches along the side. He did not see any skid marks or tire tracks in the intersection. The detective testified he would expect to see skid marks if a vehicle's rear tires slid across the pavement, but that vehicles do not always leave skid marks when their tires lose traction.

The same detective also recovered multiple nine-millimeter shell casings and bullet fragments from the scene. A deputy who canvassed the area for evidence discovered 15 shell casings in the northwest corner of the intersection.

A search of Todd's truck turned up no handguns or knives. The detective who processed the truck observed two places where a bullet struck the rear tailgate of the truck. One bullet entered the tailgate but did not exit, and the other passed through the tailgate. Two bullets penetrated the rear window of the truck. One bullet struck the right rear of the cab and was fired from behind the truck. Two other bullets struck the passenger side of the truck, at least one of which was determined to have been fired from behind the truck. One bullet fired from the front of the truck penetrated the grill. One bullet fired from the driver's side of the truck struck the driver's side of the hood. One bullet entered the rear of the truck and exited the upper right front windshield. One bullet coming from the passenger side penetrated the inside of the driver's door near the inside door handle. The detective also observed a fired bullet and a copper jacket from a fired

bullet in the bed of the truck, and he found spent bullets inside the cab. Inside the passenger compartment, the detective observed that one of the bullets that entered the rear window passed through the rear passenger headrest and then passed through the driver's headrest, and that a bullet struck the instrument panel. Inside the glove compartment, the detective found a photograph that read, "Hemet Vagos Motorcycle Club, California."

Lindsay testified she and Jason were driving when they were stopped by the police. Before pulling over, Jason told Lindsay to throw some handguns and magazines for handguns out the window. At the scene of the stop, officers recovered a loaded Phoenix .25-caliber semiautomatic handgun, an empty Astra .40-caliber magazine, and an unloaded Astra .40-caliber handgun. A shaving kit type of bag that contained the magazine to a Phoenix .25-caliber handgun and a baggie containing .40-caliber ammunition were discovered in the car Jason was driving. Jason's motorcycle was retrieved thereafter from Lindsay's house.

Cody was arrested in Palm Springs. Cody was wearing a bulletproof vest. He had a loaded .45-caliber handgun and a knife in his waistband, and he had .45-caliber ammunition in his pocket.

An autopsy of Todd revealed abrasions or scrapes to his face, and gunshot wounds to his left hand and the back of the head. The bullet that entered the back of his head passed through the middle part of his cerebellum, the pons or midbrain, and the medial aspect or middle part of his frontal lobes. The coroner recovered a medium-caliber jacketed bullet from the left parietal part of his brain. The coroner determined the cause

of Todd's death was a gunshot wound to the head, and that he died almost instantaneously.

A criminalist with the Department of Justice analyzed 22 nine-millimeter shell casings and expelled bullets that were recovered from the scene. Five of the shell casings had elliptical or oval-shaped firing pin impressions, and the remaining 17 had hemispherical or round shaped firing pin impressions. Based on the similarity of the firing pin impressions and the correspondence of marks left on the shell casings as they were ejected, the criminalist concluded the five shell casings with elliptical firing pin impressions were fired from a Glock pistol, and that all 17 of the shell casings with the hemispheric firing pin impressions were fired by a second gun. The criminalist also analyzed a Phoenix Arms .25-caliber semiautomatic pistol, an Astra A70 .40-caliber semiautomatic pistol, a Colt .32-caliber revolver, and a .40-caliber Glock pistol, neither of which could have fired the bullets from the 22 shell casings recovered from the scene.

The criminalist concluded the bullet removed from Todd was a general classification .38-caliber, and had the weight, shape, and appearance of a nine-millimeter Luger bullet. The bullet had "five-right" twist markings that were consistent with a number of firearms including a Smith and Wesson semiautomatic pistol, but was not consistent with a Glock handgun. The criminalist opined the bullet was not part of one of the five shell casings with the elliptical firing pin impressions, but could have been part of one of the 17 shell casings with the hemispheric firing pin impressions. The criminalist analyzed another bullet from the scene of the same caliber and with similar "five-right" twist markings, but could not determine whether it was fired from the same

gun. A .38-caliber nine-millimeter Luger bullet recovered from the scene had six-right polygonal markings.

The sheriff's department found Jason's blue Suburban in a residential neighborhood. An investigator found two Kevlar ballistic or bulletproof vests in the rear portion of the passenger compartment, and a black and yellow scarf in the glove compartment. No firearms or ammunition were recovered from the Suburban.

### III.

#### DISCUSSION

##### A.

#### THE TRIAL COURT CORRECTLY EXCLUDED EVIDENCE OF A PRIOR INCIDENT OF ROAD RAGE INVOLVING TODD

Defendants contend, and the majority agrees, that the trial court abused its discretion by excluding evidence that Todd previously tried to run a motorcyclist and his passenger off the road simply because the motorcyclist was a member of the Brotherhood. Defendants sought to introduce this evidence to bolster their claims of self-defense and defense of another, and contend the evidence was admissible under Evidence Code sections 1101, subdivision (b) and 1103, subdivision (a)(1). Although the proffered evidence of the road rage incident bore some striking similarities to the events immediately preceding the attack on Shaun and the shooting, the road rage incident was not material or probative to defendants' claims of self-defense and defense of another, and I would hold it was properly excluded.

1. Additional background.

Defendants moved in limine to introduce evidence at trial, under Evidence Code section 1101, subdivision (b), of a road rage incident involving Todd and a member of the Brotherhood shortly after his confrontation with Shaun at Tap Daddy's. Cody's attorney argued the road rage evidence was admissible under section 1101, subdivision (b), to prove common plan or scheme, absence of mistake, motive, and intent. Cody's and Jason's attorneys disclaimed any intention to introduce the evidence under Evidence Code section 1103, to avoid "opening the door" to evidence of defendants' character such as the Andre beating. In particular, Jason's attorney argued the evidence would prove how Todd reacted to seeing someone wearing the color yellow, the color worn by members of the Brotherhood. The prosecutor expressed some skepticism whether evidence of a victim's uncharged misconduct is admissible under Evidence Code section 1101, subdivision (b), and suggested the evidence was best analyzed under Evidence Code section 1103.

Cari testified at an Evidence Code section 402 hearing about the road rage incident. Cari had known Todd for years. Cari considered herself to be "pretty close" to Todd, and he frequented Cari's bar, Tap Daddy's. Cari testified there was an incident at Tap Daddy's in March 2010 involving Todd, Tyler, Greg, and Shaun.

Sometime in April 2010, Cari and her fiancé Dirk were riding on Dirk's motorcycle in Hemet. Dirk was a patched member of the Brotherhood. Dirk was wearing his "cut" with Brotherhood patches on it, and Cari was wearing a vest with a woman's Brotherhood patch on it. As Dirk pulled up to a stop sign, Todd drove up in his



black truck to the left of Dirk's motorcycle. Cari recognized Todd, and started to waive at him. Todd glared at Dirk and Cari. When Dirk started to ride through the intersection, Todd abruptly cut across to the right in front of Dirk's motorcycle. Dirk was forced off the road into a ditch to avoid running into the truck. Todd did not stop and drove off through the intersection.

Cari testified she saw Todd at Tap Daddy's a few days later. Cari walked up to Todd and slapped him on the face. Todd was shocked, and said, "I didn't know it was you." Todd told Cari "that he saw the colors and the patches, and he reacted to those colors." He also said, "And you know how I feel about those."

Cody's attorney argued the road rage incident and the events leading up to the shooting of Todd were nearly identical. In both instances, Todd swerved his truck in front of a motorcyclist who was a member of the Brotherhood. Cody's and Jason's attorneys argued the evidence was admissible to prove absence of mistake—that Todd did not accidentally swerve in front of Shaun—and to prove motive—that Todd swerved in front of Shaun with the intent to assault and exact revenge on a member of the Brotherhood for the Tap Daddy's incident. The prosecutor again argued the evidence was not admissible under Evidence Code sections 1101, subdivision (b) or 1103, and that the evidence was excludable under Evidence Code section 352.

The court noted the evidence might be admissible under Evidence Code section 1101, subdivision (b), but noted its concern that the defense would be attempting to open the door to introduce the evidence instead of the People. The court tentatively ruled the evidence was inadmissible because it had very little probative value and

because the road rage incident could not be independently verified, and was therefore unreliable and would be excludable under Evidence Code section 352. However, the court deferred a final ruling until the prosecution's evidence was more fully developed.

At the tail end of the People's case-in-chief, Cody's attorney requested to be heard again on the admissibility of the road rage evidence. Counsel argued the evidence was admissible under Evidence Code section 1103 to evaluate Todd's conduct even if defendants were unaware of the road rage incident. The court noted the evidence might be admissible to prove Cody's state of mind if he was aware of the road rage incident. Cody's attorney said Cody did not know about the incident at the time of the shooting, but that Shaun did. Shaun's attorney argued his client would testify that he was aware of Todd's propensity for violence, but the court noted Shaun's state of mind at the time of the shooting was irrelevant to the sole charge against him of being an accessory after the fact. Jason's attorney argued the road rage incident was relevant under Evidence Code section 1103 to prove defendants' actions on the night of the shooting were reasonable, and not to prove their state of mind. The trial court ruled the evidence was not admissible under Evidence Code section 1103 because proving Shaun's state of mind was irrelevant, and that the evidence was excluded under Evidence Code section 352 because its probative value was substantially outweighed by its prejudicial impact.

## 2. Applicable law.

"Only relevant evidence is admissible (Evid. Code, §§ 210, 350), 'and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).)' [Citation.] 'The

test of relevance is whether the evidence tends “logically, naturally, and by reasonable inference” to establish material facts such as identity, intent, or motive.’ [Citation.]” (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

Evidence Code section 1101, subdivision (a), generally prohibits admission of evidence of a person’s character, including evidence of character in the form of specific instances of uncharged misconduct, “to prove his or her conduct on a specified occasion.” Evidence Code section 1101, subdivision (b), clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when it is relevant to establish some fact other than the person’s disposition to commit such an act, such as motive, intent, and absence of mistake or accident.

““The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.’ [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 22 (*Lindberg*).) “As long as there is a *direct relationship* between the prior offense and an element of the charged offense, introduction of that evidence is proper. [Citations.]” (*People v. Daniels* (1991) 52 Cal.3d 815, 857, italics added.)

“The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] ‘[T]he recurrence of a similar result . . . tends (increasing with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal,

intent accompanying such an act . . . .’ [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant “‘probably harbor[ed] the same intent in each instance.” [Citation.]”” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).)

“The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citation.]” (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) “[E]vidence of uncharged misconduct “is so prejudicial that its admission requires extremely careful analysis”” under section 352. (*People v. Lewis* (2001) 25 Cal.4th 610, 637, quoting *Ewoldt, supra*, 7 Cal.4th at p. 404.) “‘Because this type of evidence can be so damaging, “[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.” [Citation.]”” (*People v. Fuiava* (2012) 53 Cal.4th 622, 667 (*Fuiava*).)

““The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.” [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 638.) The more probative the uncharged crime is to proving a material fact in the case, the less prejudicial it will likely be. Conversely, dissimilarities between the uncharged crime and the charged offense will necessarily decrease the probative value of the uncharged crime, and it will increase the possibility that admission of the evidence was

prejudicial. (*People v. Balcom* (1994) 7 Cal.4th 414, 427 [discussing prejudice analysis for evidence admitted to prove common design or plan].)

“Evidence Code section 1103, subdivision (a)(1) provides [another] exception to Evidence Code section 1101, subdivision (a) when a defendant offers evidence regarding the character or trait of a victim ‘to prove conduct of the victim in conformity with the character or trait of character.’ Of course, the trial court may exclude otherwise admissible evidence pursuant to Evidence Code section 352 if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative. [Citations.] The trial court must always perform its gatekeeping function pursuant to Evidence Code section 350 to exclude evidence that is irrelevant.” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828 (*Gutierrez*).)

“‘It has long been recognized that where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible.’ [Citations.] Under Evidence Code section 1103, such character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence. [Citation.]” (*People v. Wright* (1985) 39 Cal.3d 576, 587.)

“““Rulings made under [Evidence Code sections 1101 and 352 . . .] are reviewed for an abuse of discretion. [Citation.]” [Citation.] “Under the abuse of discretion standard, ‘a trial court’s ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citations.]””” (*People v. Rogers* (2013) 57 Cal.4th 296, 326.) The decision to exclude evidence under Evidence

Code section 1103, subdivision (a)(1), is also reviewed for abuse of discretion.

(*Gutierrez, supra*, 45 Cal.4th at p. 827.)

3. Analysis.

I would conclude the road rage evidence was not admissible under Evidence Code section 1101, subdivision (b).<sup>11</sup> Unlike the Andre evidence, there were some relevant similarities between the road rage incident and the shooting of Todd. Assuming for purposes of this discussion the truth of Shaun and Cody’s testimony and the inferences to be drawn from the evidence as a whole, the record shows that just before the attack on Shaun and the shooting, Todd tried to run Shaun (and possibly Jason) off the road with his truck out of animosity toward members of the Brotherhood. The proffered testimony about the road rage incident, if believed, showed Todd had previously tried to run Cari and Dirk off the road with his truck based on the same animosity toward members of the Brotherhood. Arguably, this satisfies the “least degree of similarity” to admit the evidence to prove Todd’s motivation or intent when he drove his truck toward Shaun. (*Ewoldt, supra*, 7 Cal.4th at p. 402.)

But the road rage evidence was only probative to supporting defendants’ claims that Todd swerved in front of Shaun before the attack on Shaun and the shooting. It bore

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<sup>11</sup> The People contend defendants abandoned their argument in the trial court that the road rage evidence was admissible under Evidence Code section 1101, subdivision (b), and, therefore, forfeited their argument on appeal based on that section of the Evidence Code. Defendants argue they did not forfeit their appellate claim under Evidence Code section 1101, subdivision (b), and in a supplemental opening brief Jason argues any forfeiture of the claim was the result of ineffective assistance of counsel. Rather than decide whether defendants forfeited their claim and whether the forfeiture was the result of ineffective assistance of counsel, I address but ultimately reject the claim on the merits.

no relevance on the ultimate issue in this case—whether defendants acted in self-defense or in defense of another by shooting at Todd’s truck after he turned left and drove away from Jason and into a field. Because the road rage evidence had little or no tendency to prove the ultimate fact at issue in this case, and at most was cumulative to Cody and Shaun’s testimony, it was properly excluded under section 352. (*Fuiava, supra*, 53 Cal.4th at p. 667; *Lindberg, supra*, 45 Cal.4th at p. 22.)

The same is true with respect to Evidence Code section 1103. Although evidence of a victim’s aggressive or violent character is generally admissible in homicide cases (*People v. Wright, supra*, 39 Cal.3d at p. 587), the evidence must meet the threshold requirement of relevancy, and it must not be excludable under Evidence Code section 352. (*Gutierrez*, 45 Cal.4th at pp. 827-828.) To repeat, the road rage evidence was only relevant to prove Todd swerved his truck in front of Shaun, something the defense attempted to prove independently through Shaun and Cody’s testimony. The road rage evidence was not relevant to proving defendants shot at Todd’s truck in self-defense or in defense of another after Todd turned left and drove away from Jason. Moreover, defendants concede that only Shaun knew about the road rage incident before the shooting, so the evidence was not relevant to establish Jason and Cody’s states of mind when they shot at Todd’s truck for purposes of establishing they acted in the heat of passion.

Finally, even if I were to conclude the road rage evidence should have been admitted under Evidence Code sections 1101, subdivision (b) or 1103, I would find no prejudice. An appellate court may only reverse the judgment for evidentiary error if it

concludes the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *People v. Richardson* (2008) 43 Cal.4th 959, 1001; see Evid. Code, § 353, subd. (b).) Evidentiary error is harmless unless it is reasonably probable defendants would have received a more favorable result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see *People v. Fudge* (1994) 7 Cal.4th 1075, 1103.)

The evidence that defendants continued to fire at Todd's truck even after he was no longer driving toward Jason and after he no longer posed a threat to Jason undermined defendants' claims of self-defense or defense of another, so it is not reasonably probable the jury would have reached a different conclusion had the road rage evidence been admitted. At most, the road rage evidence would have bolstered Cody and Shaun's testimony that Todd drove his truck toward Shaun and that Todd was holding what looked like a weapon during the attack on Shaun. The evidence would not have strengthened defendants' claims of self-defense, defense of another, or heat of passion.<sup>12</sup>

B.

DEFENDANTS WERE NOT PREJUDICED BY THE ERRONEOUS ADMISSION  
OF THE ANDRE EVIDENCE AND INSTRUCTIONAL ERROR

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<sup>12</sup> Because it reverses the judgment based on state law evidentiary error, the majority does not address defendants' argument that exclusion of the road rage evidence violated their federal due process rights. "[T]he admission of evidence in violation of state law may . . . violate due process, but only if the error rendered the defendant's trial fundamentally unfair." (*People v. Merriman* (2014) 60 Cal.4th 1, 70 (*Merriman*), quoting *People v. Partida* (2005) 37 Cal.4th 428, 439; see *Estelle v. McGuire* (1991) 502 U.S. 62, 70; see also *People v. Benavides* (2005) 35 Cal.4th 69, 91 ["[G]enerally, violations of state evidentiary rules do not rise to the level of federal constitutional error."].) I would conclude exclusion of the road rage evidence did not deprive defendants of a fair trial.



I agree with the majority that the Andre beating and the shooting of Todd did not share the “least degree of similarity” needed for admission under Evidence Code section 1101, subdivision (b), to prove intent. (*Ewoldt, supra*, 7 Cal.4th at p. 402.) As the Supreme Court held in *Ewoldt*, evidence of uncharged acts are probative to proving the question of intent when the uncharged acts and the charged offenses have the same result. (*Ibid.*) Here, the result of the beating of Andre and the shooting of Todd were very different and, consequently, the beating was not probative on the question of intent to kill.

Unlike the majority, I conclude defendants were not prejudiced by the erroneous admission of the Andre evidence. The main issue in this case was whether Jason and Cody fired at Todd’s truck and at Tyler and Greg with the intent to kill or, as defendants asserted, in self-defense and in defense of another. Cody testified he fired warning shots to stop Todd from going back and beating Shaun, to stop Tyler and Greg from fighting with Shaun, and to prompt Todd to get back in his truck. According to Cody, Todd took off driving directly toward where Jason was standing across the intersection. Cody testified he fired his gun at the truck to prevent Todd from killing Jason, and that Jason also fired at the truck from the opposite direction.

However, the evidence shows Jason continued to fire his weapon at the truck even after it turned left and away from him and drove into the field, and the majority of the bullets that struck the truck, including the bullet that killed Todd, came from behind and not from the front. There was no continuing danger to Jason once the truck fully turned and drove away that would justify Jason firing additional bullets in self-defense. There

was also evidence in the record to support the jury's conclusion that Jason shot at Tyler and Greg. In addition, there was strong evidence that Jason was extremely angry with Todd over the incident at Tap Daddy's and the confrontation at Psycho's house, and that Jason expressed a desire to kill Todd.

Jason's statement before the shooting that he wanted to kill Todd, which the majority discounts as idle talk, seriously undermined his claim that he acted in self-defense. Moreover, in my opinion, the evidence of what defendants did and said in the hours and days after the shooting undermined the credibility of their claimed defenses. Immediately after the shooting, Jason bragged about being "suited up" better than the troops in Iraq and of firing multiple clips at Todd. Cody also appeared to brag of his involvement in the shooting. These statements tend to undermine the credibility of their claim that defendants fired at Todd in self-defense or defense of another. They did not remain at the scene to tell the police they acted in self-defense or defense of another. Over the next few days, they did not contact the police or speak to an attorney to explain that they had fired at Todd in self-defense or in the heat of passion. Instead, Cody and Jason armed themselves to the teeth and fled the area—Cody going to Palm Springs and Jason attempting to flee to San Diego. In light of these circumstances, I would conclude it is not reasonably probable the jury would have reached a different conclusion had the Andre propensity evidence been excluded.<sup>13</sup>

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<sup>13</sup> As for Cody, the People contend his acquittal on the counts of first degree murder and attempted murder, and his guilty verdict of the voluntary manslaughter of Todd, shows the jury believed Cody's assertion of imperfect self-defense or imperfect defense of another notwithstanding admission of the Andre evidence. I agree. Given the

I do agree with the majority that the trial court should not have instructed the jury with CALCRIM No. 3472 that “[a] person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.”<sup>14</sup> The prosecution’s own witnesses testified that Todd drove in the opposite direction of the pizza parlor. When Todd saw Jason and Shaun turn around and ride in the opposite direction, Todd made a U-turn and pursued the motorcyclists. This evidence seriously undermined the theory that defendants pursued Todd and provoked the quarrel.

However, I disagree that the instructional error prejudiced defendants. “It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; see *People v. Perez* (2005) 35 Cal.4th 1219, 1226-1227 [evidence did not support aiding and abetting instruction].) “[S]uch an error does not,” however, “appear to be of federal constitutional dimension.” (*People v. Hamilton* (2009) 45 Cal.4th 863, 937, citing *People v. Guiton*, at pp. 1129-1130.) “The error of instruction on an inapplicable legal theory is reviewed under the reasonable probability standard of [*Watson, supra*, 46 Cal.2d at

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state of the evidence, it is not reasonably probable the jury would have acquitted Cody completely on count 1 had the Andre evidence not been admitted.

I would also reject defendants’ assertion that improper admission of the Andre evidence violated their federal due process rights. Although I agree with that majority that the trial court abused its discretion by admitting the Andre evidence, on this record I cannot conclude the prejudice arising from that ruling was so great that it deprived defendants of a fair trial.

<sup>14</sup> The People contend defendants did not object to the trial court instructing the jury with CALCRIM No. 3472, but concede we may review a claim of instructional error that allegedly affects defendants’ substantial rights even if defendants failed to timely object. (Pen. Code, § 1259; *People v. Johnson* (2016) 62 Cal.4th 600, 639.)

p. 836].”” (*People v. Debose* (2014) 59 Cal.4th 177, 205-206, quoting *People v. Mills* (2012) 55 Cal.4th 663, 681.)

I would conclude the error was harmless. Notwithstanding that Todd may have provoked the fight at the intersection of Lincoln and Palm, the evidence showed Jason continued to fire at Todd’s truck even after he fled and no longer posed a threat to Jason. The jury’s verdict against Cody for voluntary manslaughter demonstrates the jury properly followed the instructions on imperfect self-defense and imperfect defense of another. Moreover, the jury was properly instructed that not all of the instructions were necessarily applicable in this case, and that the jury should only follow the instructions that applied to the facts as the jury found them. We must presume the jury understood and properly applied that instruction. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299 [jury presumed to have followed CALJIC No. 17.31 and disregarded inapplicable instruction].) The fact the jury was so instructed mitigated any prejudice from the trial court incorrectly giving the jury CALCRIM No. 3472. (*People v. Saddler* (1979) 24 Cal.3d 671, 684; *People v. Vega* (2015) 236 Cal.App.4th 484, 503; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472.)

C.

THE TRIAL COURT PROPERLY LIMITED EVIDENCE ABOUT VIOLENT  
ACTS ORIGINALLY ATTRIBUTED TO THE VAGOS

Cody argues the trial court prejudicially abused its discretion by limiting his ability to introduce evidence of crimes that, at the time of the shooting, were attributed to members of the Vagos. Cody's theory of defense of another was that he knew of the Vagos' violent acts and of Todd's association with the Vagos and, therefore, he acted reasonably when he used force to defend Jason and Shaun. The trial court permitted Cody to introduce some, but not all of his evidence of crimes that were originally attributed to the Vagos. I would find no error.

1. Additional background.

After the prosecutor completed his case-in-chief, Cody's attorney sought a ruling on the admissibility of the evidence of crimes originally attributed to the Vagos to bolster Cody's claim that he acted in reasonable self-defense or in reasonable defense of another when he shot at Todd's truck. The trial court tentatively ruled evidence of violent acts attributed to the Vagos would be relevant to prove Cody's state of mind and claim of self-defense, but prohibited Cody's attorney from discussing those violent acts during counsel's opening statement. A short while later, the trial court modified its ruling. Cody would be permitted to introduce some evidence of violent conduct attributed to the Vagos, but the court would limit the number of questions counsel could ask Cody on that topic.

Cody's attorney submitted a written offer of proof detailing 12 events or crimes previously attributed to the Vagos that Cody personally witnessed or became aware of before the shooting of Todd. After further discussion, the trial court ruled Cody's attorney could inquire into five of the 12 events or crimes (Nos. 3, 4, 6, 7, & 12 of the offer of proof), but excluded the remainder.

Cody testified that until the day of the shooting, he did not know Todd and Tyler, he had never heard their names mentioned before, and he did not know where Todd lived. Cody was not an official hang-around of the Brotherhood, but he was friends with members of the club. Growing up in Hemet, Cody was familiar with the Mongols and Vagos motorcycle clubs, and he was tattooed by members of the Vagos. Cody never had trouble with members of the Vagos or Mongols.

When Jason told Cody about the confrontation with Todd at Psycho's house and that Todd said he "was now making this a club issue," Cody asked Jason, "What club?" Jason answered, "The Vagos." Based on what he knew about the Vagos, Cody was concerned that Todd said he was "making it a club issue." Cody believed Todd and the Vagos might target him and his friends in the Brotherhood. Cody then took a Colt .32-caliber revolver owned by Jason and bullets to give to Psycho for his protection. Cody did not have one of his own guns with him, so he also took a Glock handgun owned by Jason.

Cody testified that after he pulled up at the intersection of Lincoln and Palm and stopped behind Todd's truck, he fired warning shots into the air to prevent Todd, who appeared to be holding a weapon, from walking back to Shaun, and to stop Tyler and

Karl from fighting with Shaun. When Todd got back into his truck, he drove straight at Jason. Cody testified he fired four times at the back of the truck to prevent Todd from killing Jason.

Cody testified he was aware of incidents that took place in the Hemet area involving the Vagos, which caused him some concern. Cody had learned from the newspapers that the Vagos were blamed for some attacks on the Hemet Police Department. Through word of mouth from police officers at his gym and from the newspapers, Cody learned the police claimed the Vagos were responsible for running a gas line into the Hemet Police Department (No. 3 of the offer of proof); attaching a zip gun to the parking lot fence at the police station (No. 4); attaching a pipe bomb to the underside of an undercover police vehicle (No. 6); and firing a rocket launcher at the police station from a roof across the way that backfired and set fire to the roof (No. 12). On the day of the shooting, Cody still believed the Vagos were responsible for these acts. It was not until June or July of the following year that Cody learned the Vagos were not responsible.

The parties stipulated that in 2011, the Vagos were exonerated of any involvement in the attempted attacks on the Hemet police station, and that the responsible parties who were prosecuted and convicted for those acts had no connection to the Vagos.

## 2. Applicable law.

“To be exculpated on a theory of self-defense one must have an honest and reasonable belief in the need to defend. (Pen. Code, § 197; [citations].) A bare fear is not enough; ‘the circumstances must be sufficient to excite the fears of a reasonable person,

and the party killing must have acted under the influence of such fears alone.’ (Pen. Code, § 198.)” (*People v. Flannel* (1979) 25 Cal.3d 668, 674-675, superseded by statute on another ground as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 777.)

“The threat of bodily injury must be imminent [citation], and ‘. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citations.]” (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065.) Whether a defendant reasonably acted in self-defense “is determined from the point of view of a reasonable person in the defendant’s position. The jury must consider all the facts and circumstances it might “expect[] to operate on [defendant’s] mind . . . .” [Citation.]” (*Id.* at p. 1065.) Evidence that the victim of the assault threatened the defendant is admissible to establish the defendant acted in self-defense. (*Ibid.*) “A person claiming self-defense is . . . “entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear.” [Citation.]” (*Ibid.*) The jury may also consider evidence that a defendant was threatened by a person or persons other than the victim—such as the victim’s family—if the defendant reasonably associated the victim with the third party threats. (*Id.* at pp. 1065-1069.)

“Evidence of third party threats is relevant only if other evidence shows fear of imminent harm. [Citation.] Even then its probative value may be slight.” (*People v. Minifie, supra*, 13 Cal.4th at p. 1070.) “[T]hird party threats inherently carry less weight than threats from the victim. This attenuation does not justify excluding the evidence categorically, but it may be considered on a case-by-case basis. The more vague the threats, and the weaker the logical link between them and the defendant’s actions, the



more the court may be justified in excluding them. Similarly, evidence of a third party's reputation for violence may be particularly susceptible to exclusion. [Citation.] [¶] Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion. [Citations.]" (*Id.* at p. 1070.)

### 3. Analysis.

Cody argues the trial court's limitation on his ability to introduce evidence of violent acts originally attributed to the Vagos undercut his claim of self-defense and defense of another. Although Cody concedes the trial court permitted him to introduce some evidence of violent acts attributed to the Vagos, he argues the remainder of his evidence was essential to incrementally prove his claim of self-defense. He contends the trial court's application of Evidence Code section 352 had to bow to his due process right to present all evidence that was probative to his defense. (See *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599.) I am not persuaded.

As our Supreme Court recently held, a trial court is not "constitutionally . . . compelled to permit defendant to introduce *all possibly relevant* evidence on [a claim of self-defense] despite its marginal relevance, the possible effect upon the jury's ability to remain focused on the issues before it (rather than becoming sidetracked on collateral questions), and the potentially significant amount of time entailed in admitting the evidence in a manner fair to both sides. [Citations.]" (*Fuiava, supra*, 53 Cal.4th at pp. 665-666, italics added.) "Although . . . a criminal defendant has a constitutional right to present all relevant evidence of significant probative value in his favor [citations], "[t]his does not mean that an unlimited inquiry may be made into collateral matters; the

proffered evidence must have more than ‘slight-relevancy’ to the issues presented.”

[Citation.]”” (*People v. Homick* (2012) 55 Cal.4th 816, 865, quoting *Jennings, supra*, 53 Cal.3d at p. 372.)

The trial court correctly permitted Cody to introduce the most significant violent acts originally attributed to the Vagos to support his claim that he feared for the safety of his friends when Todd mentioned a “club issue.” Cody testified he was aware of the series of attacks on the Hemet Police Station. This was compelling evidence that Cody believed the Vagos were capable of spectacular and unusually sophisticated acts of violence, and bolstered Cody’s claim that he feared Todd and his associates in the Vagos would violently exact revenge against Cody’s friends in the Brotherhood. Therefore, Cody was in fact afforded the opportunity to present relevant self-defense evidence.

I fail to see how piling on additional evidence that members of the Vagos were arrested the day before the attacks on the police station (Nos. 1 & 2 of the offer of proof), that a suspicious suitcase was found near a Social Security office in Hemet (No. 5), that 31 members of the Vagos were later arrested in four different states (No. 8), that the police searched the home of a friend of Cody’s who associated with the Vagos (No. 9), and of the arson of vehicles at Hemet City Hall and of a portable classroom used by the Hemet Police Department (Nos. 10 & 11), would have *significantly* added to the evidence that was admitted. Because this additional evidence was merely cumulative, I would conclude the trial court properly excluded it under Evidence Code section 352. (*People v. Homick, supra*, 55 Cal.4th at p. 865; *Fuiava, supra*, 53 Cal.4th at pp. 665-666.)

Finally, even if I were to conclude the trial court abused its discretion by excluding some of Cody's evidence about the Vagos, I would conclude it is not reasonably probable the jury would have reached a different conclusion had the trial court permitted Cody to admit the evidence. (*Watson, supra*, 46 Cal.2d at p. 836.) As it is, the jury acquitted Cody of first and second degree murder and of attempted murder, so clearly the jury believed Cody's claim of imperfect self-defense or imperfect defense of another or that he acted in the heat of passion. And I would conclude the order excluding some of the Vagos evidence, when Cody was permitted to introduce the most significant evidence about the Vagos, did not deprive Cody of a fair trial. (*Merriman, supra*, 60 Cal.4th at p. 70.)

#### IV.

#### CONCLUSION

For the foregoing reasons, I respectfully dissent.

McKINSTER

J.